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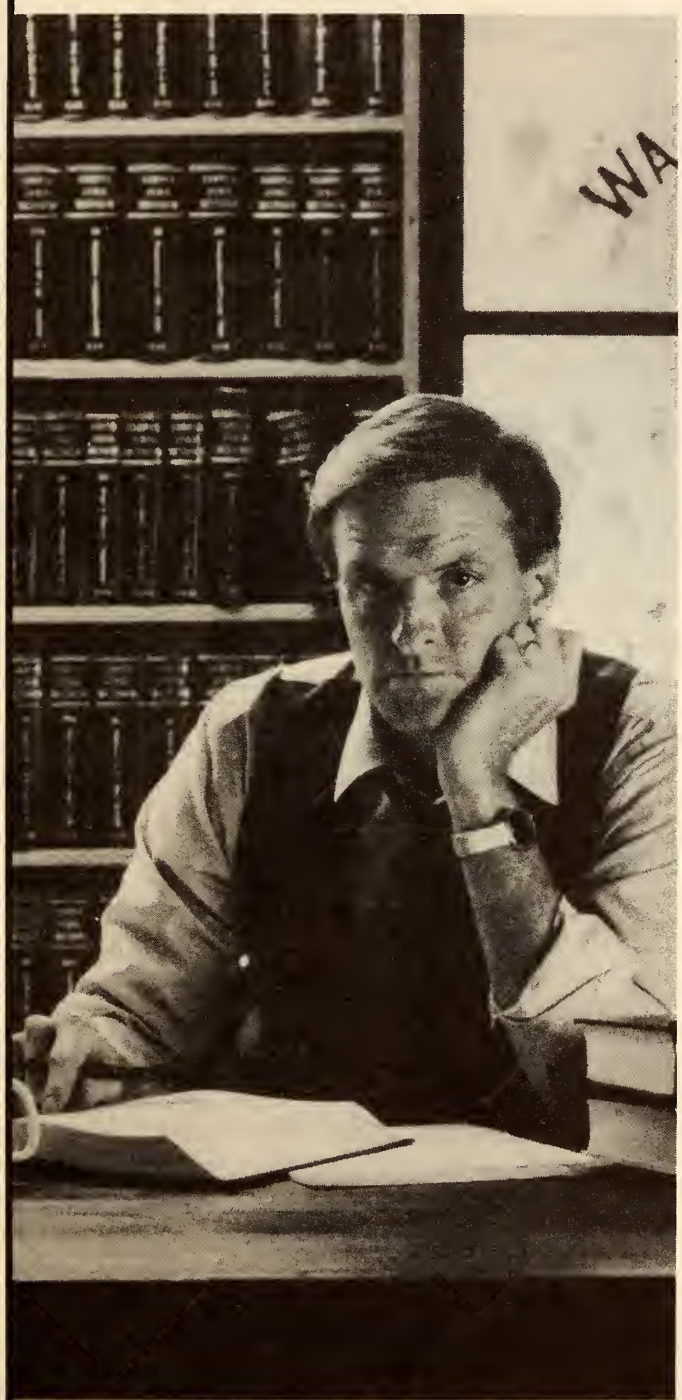

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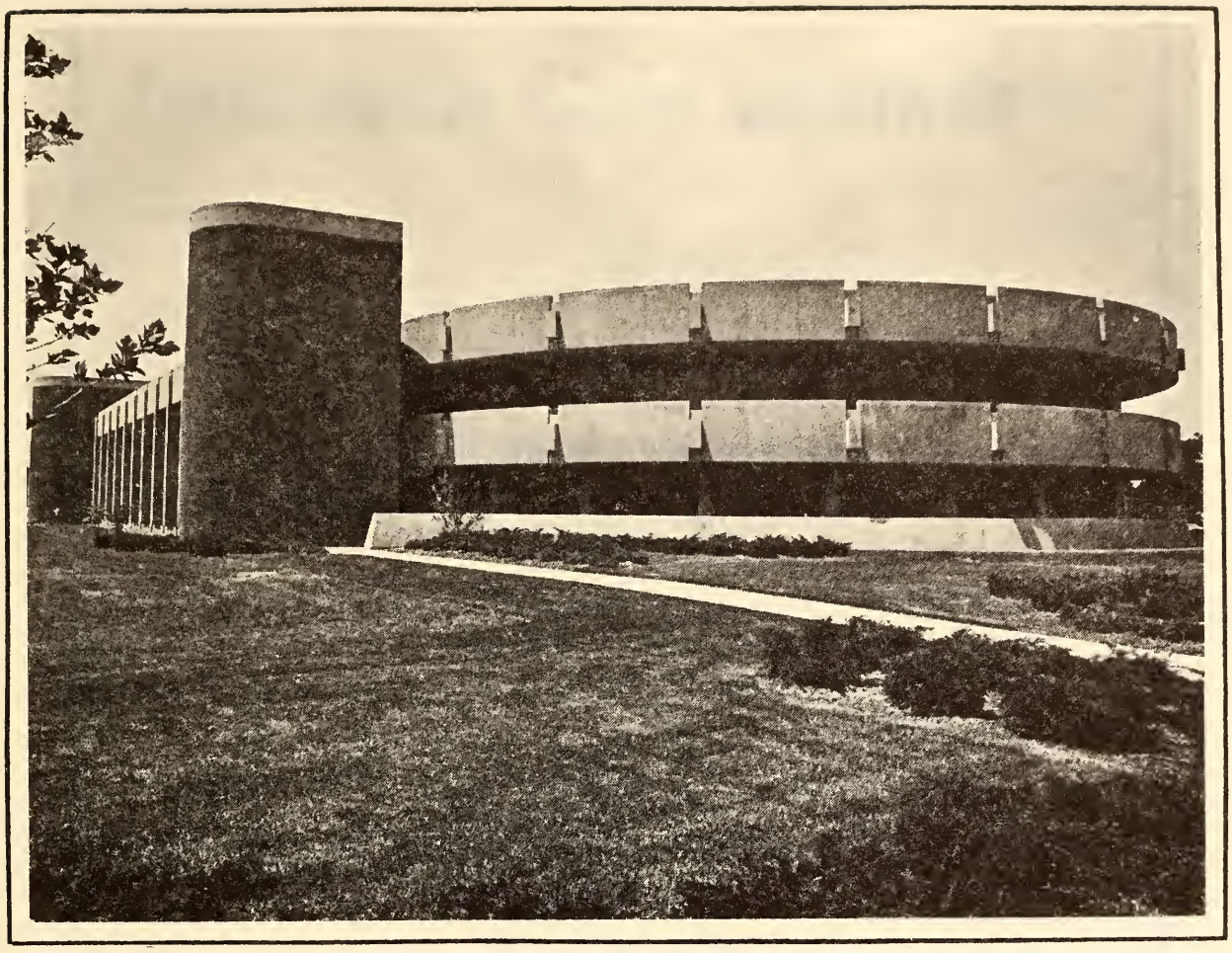

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Indiana Law Review

Volume 20 **1987** **Number 4**

TABLE OF CONTENTS

Article

Notes

Volume 20 Fall 1987 Number 4

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Indiana Law Review

Volume 20 1987 Number 4

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., Philadelphia Newspapers, Inc. v. Hepps, and Speech on Matters of Public Concern: New Directions in First Amendment Defamation Law

Don Lewis*

I. Introduction

Since the United States Supreme Court subjected the common law of defamation to the constraints of the first amendment in *New York Times Co. v. Sullivan*,[1] the Court's decisions in the area have been marked by a continual process of redefinition of the scope and the strength of the "constitutional privilege to defame."[2] In *New York Times*, the Court held that a public official could not recover damages in a libel action brought against a critic of his official conduct unless he proved, by clear and convincing evidence, "that the statement was made with 'actual malice'—that is, with knowledge that it was false or

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[1]376 U.S. 254 (1964). "The Court's consistent view prior to *New York Times Co. v. Sullivan* . . . was that defamatory utterances were wholly unprotected by the First Amendment." Gertz v. Robert Welch, Inc., 418 U.S. 323, 384-85 (1974) (White, J., dissenting). *See* Roth v. United States, 354 U.S. 476 (1957); Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Near v. Minnesota, 283 U.S. 697 (1931).

[2]Keeton, *Defamation and Freedom of the Press*, 54 Tex. L. Rev. 1221, 1226 (1976). The central issue in each of the Court's decisions has been the proper balance to be struck between a state's interest in protecting the reputations of its citizens and the freedom of speech guaranteed by the first amendment. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 325 (1974). The resolution of this question, albeit without the first amendment consideration, was not unknown to the common law. *See, e.g.*, Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191, 215; W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 111, 772 (5th Ed. 1984) (explanation for anomalies in law of defamation "is in part one of historical accident and survival, in part one of the conflict of opposing ideas of policy in which our traditional notions of freedom of expression have collided violently with sympathy for the victim traduced and indignation at the maligning tongue").

with reckless disregard of whether it was false or not."[3] Three years later, in *Curtis Publishing Co. v. Butts*,[4] the Court extended the *New York Times* privilege to cases involving defamation of, "public figures".[5] A plurality of the Court further extended the privilege in *Rosenbloom v. Metromedia, Inc.*,[6] to all defamatory speech relating to matters of "public or general concern",[7] regardless of whether the plaintiff was a private figure or a public figure. In *Gertz v. Robert Welch, Inc.*,[8] the Court rejected the *Rosenbloom* subject matter test and held that a "private figure" may constitutionally recover actual damages upon proof of the defendant's negligence without regard to the nature of the speech at issue.[9]

In two recent decisions the Court has again attempted to accommodate the conflicting interests of reputation and freedom of speech, and in doing so has returned to first amendment defamation law a consideration seemingly discarded in *Gertz*: whether the speech at issue is "of public concern". The cases are *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[10] and *Philadelphia Newspapers, Inc. v. Hepps*.[11]

II. The *Dun & Bradstreet* Case

In *Dun & Bradstreet*, a construction contractor sued Dun & Bradstreet, a credit reporting agency, for falsely reporting that the contractor had filed for bankruptcy. After trial in a Vermont state court, a jury returned a verdict awarding the contractor $50,000 in compensatory or presumed damages, and $300,000 in punitive damages. The trial judge, however, granted a new trial, based on his doubts as to the propriety of his charge.[12] The Supreme Court of Vermont reinstated the verdict, based on its view that credit reporting firms such as Dun & Bradstreet are not "the type of media worthy of First Amendment protection as contemplated by *New York Times* and its progeny,"[13] and that the *Gertz*

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[3]New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

[4]388 U.S. 130 (1967).

[5]*See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 n.7 (1974) (*Butts* stands for the principle that the *New York Times* test reaches both public officials and public figures).

[6]403 U.S. 29 (1971).

[7]*Id.* at 44.

[8]418 U.S. 323 (1974).

[9]The Court, however, held that presumed and punitive damages were not allowed, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 350. *See infra* note 25.

[10]472 U.S. 749 (1985).

[11]106 S. Ct. 1558 (1986).

[12]Dun & Bradstreet argued that the charge permitted the jury to award presumed and punitive damages on less than a finding of knowledge of falsity or reckless disregard for the truth, and that the charge was therefore contrary to the rule established in *Gertz*. 472 U.S. at 752.

[13]143 Vt. 66, 73-74, 461 A.2d 414, 417-18 (1983).

standard of proof regarding presumed and punitive damages was therefore inapplicable.

The United States Supreme Court affirmed the result reached by the Vermont Supreme Court, but not its reasoning. Instead, the Court ignored the media/non-media distinction drawn by the Vermont Supreme Court[14] and held that the *Gertz* limitation on the recovery of presumed and punitive damages to only those plaintiffs proving *New York Times* "malice" does not apply "when the defamatory statements do not involve matters of public concern."[15]

Writing for a three-member plurality,[16] Justice Powell reached this conclusion by balancing the state's interest in compensating injury to reputation with the first amendment's interest in protecting freedom of speech. In *Gertz*, this balancing process resulted in a holding that a private plaintiff need only show negligence to recover actual damages. The standard of proof approved in *Gertz* followed from the Court's perception that a state has an increased need to protect the reputation of private plaintiffs who have not "assumed the risk" of defamation by entering the public arena and who have limited ability to rebut false charges against them; the disallowance of presumed or punitive damages upon a mere showing of negligence was based on the perceived need to control "the discretion of juries to award damages where there is no loss"[17] and on the view that presumed and punitive damages are not proper compensation for the actual injury to reputation with which *Gertz* was concerned.[18] Presumed damages, thought by the Court to

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[14]After hearing the initial arguments, which addressed the propriety of the media/non-media distinction, the Court ordered the parties to address the additional question whether "the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the speech is of a commercial or economic nature." 468 U.S. 1214 (1984). *See The Supreme Court*, 1984 Term, 99 HARV. L. REV. 1, 213-14 n.14 (1985).

[15]472 U.S. at 763.

[16]The opinion was joined by Justices Rehnquist and O'Connor.

[17]418 U.S. at 349.

[18]The state's interest, Justice Powell wrote, "extends no further than compensation for actual injury." 418 U.S. at 349. The definition of "actual injury" in *Gertz*, however, was not suited to the task of controlling jury discretion and ensuring that only damage to an individual's reputation would be compensated; the Court included "personal humiliation . . . and mental anguish and suffering" in its list of compensable actual injuries. *Id.* at 350. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 367 (Brennan, J., dissenting) (Court's definition in *Gertz* of actual injury "inevitably allow[s] a jury bent on punishing expression of unpopular views a formidable weapon for doing so"); Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 756 (1984). Indeed, in Time, Inc. v. Firestone, 424 U.S. 448 (1976), the Court upheld an award of damages in a case in which the plaintiff had offered no proof of damaged reputation whatsoever, Justice Rehnquist writing:

> Petitioner's theory seems to be that the only compensable injury in a defamation action is that which may be done to one's reputation, and that claims not predicated upon such injury are by definition not actions for defamation. But Florida has obviously decided to permit recovery for other injuries without regard

allow gratuitous awards of money damages far in excess of any actual injury,[19] and punitive damages, characterized by the Court as "wholly irrelevant" to a state's interest in compensating injury to one's reputation,[20] were not allowed, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."[21]

In *Dun & Bradstreet*, however, Justice Powell's application of the balancing process resulted in a different outcome. Since Greenmoss Builders, like Elmer Gertz, was a "private figure," the state's interest in protecting the reputation of the plaintiff was identical to the state's interest in *Gertz*.[22] But since the speech at issue in *Dun & Bradstreet* was not of public concern,[23] the first amendment interest was "less

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> to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation as that term is meant in *Gertz*. In that opinion we made it clear that States could base awards on elements other than injury to reputation, specifically listing 'personal humiliation, and mental anguish and suffering' as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault. Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.

424 U.S. at 460. *See* Green, *Political Freedom of the Press and the Libel Problem*, 56 TEX. L. REV. 341, 362-64 (1978); Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1437-39 (1975).

[19]418 U.S. at 349.

[20]*Id.* at 350.

[21]*Id.* at 349.

[22]472 U.S. at 757.

[23]*Id.* at 761-63. One of the reasons given by Justice Powell for giving reduced protection for the speech at issue in *Dun & Bradstreet* was the fact that "the speech is wholly false and clearly damaging to the victim's business reputation." 472 U.S. at 762. This sort of reasoning comes close to that about which Justice Powell warned in *Gertz*: "It would undermine the rule of [*New York Times*] to permit the actual falsity of a statement to determine whether or not its publisher is entitled to the benefit of the [*New York Times* 'malice'] rule." 418 U.S. at 331 n.4 (quoting Gertz v. Robert Welch, Inc., 471 F.2d 801, 806 (1972)). *See* New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (rejecting "any test of truth" as a requirement for first amendment protection); Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630, 634-35 (1968):

> All too frequently a court's first step when presented with a defamation or invasion of privacy case is to determine whether the publication in question is true or false. If it is false, the court seems to find the balancing process facilitated, with the remainder of the analysis following as a matter of course. At the heart of this approach is the view that truth is more deserving of protection than falsehood since a lie has no "socially redeeming value"; unlike a true statement, a false one contributes nothing — it may not only lead the hearer astray, but may also retard development of the greater truth . . . .
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> . . . .
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> . . . This approach, however, runs afoul of the underlying premises of the first amendment. That amendment affirms the high value placed by the founding fathers on free and unfettered discussion. Yet discussion will surely be inhibited

important than the one weighed in *Gertz*.''[24] As a result, the Court held that ''the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.' ''[25]

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if the speaker must run the risk that liability will ensue if his statements are subjected to judicial scrutiny . . . . Consider how much greater this deterrent will be if the speaker is addressing himself to an area in which there is no agreement on what is the 'truth.'

[24]472 U.S. at 758. This determination, of course, implies that the speech involved in *Gertz* was speech of public concern; similarly, in *Philadelphia Newspapers* Justice O'Connor expressed the view that the speech at issue in *Gertz* was of public concern. 106 S.Ct. at 1563. In *Gertz*, however, Justice Powell expressly refused to classify the speech at issue in such terms. 418 U.S. 323, 346 (1974).

[25]472 U.S. at 761. The argument advanced by Justice Powell in reaching this conclusion is not completely persuasive. Justice Powell wrote in *Dun & Bradstreet* that ''[i]n *Gertz*, we found that the state interest in awarding presumed and punitive damages was not 'substantial' in view of their effect on speech at the core of First Amendment concern.'' 472 U.S. at 760. It seems relatively clear, however, that *Gertz* described as not of substantial state concern the awarding of presumed damages. *See* 418 U.S. at 349-50. Punitive damages, on the other hand, were described in *Gertz* as being ''wholly irrelevant'' to a state's interest in redressing injuries to the reputations of its citizens. *Id.* at 350. And since Justice Powell had conceded that the state's interest was identical in both cases, it is hard to see how punitive damages were not proper in *Gertz* but were in *Dun & Bradstreet*; as Justice Brennan wrote in dissent, ''[w]hat was 'irrelevant' in *Gertz* must still be irrelevant . . . .'' 472 U.S. at 794.

Justice Powell's response to Justice Brennan's point was the following:

[T]he dissent finds language in *Gertz* that, it believes, shows the State's interest to be 'irrelevant.' . . . It is then an easy step for the dissent to say that the State's interest is outweighed by even the reduced First Amendment interest in private speech. *Gertz*, however, did not say that the state interest was 'irrelevant' in absolute terms. Indeed, such a statement is belied by *Gertz* itself, for it held that presumed and punitive damages were available under some circumstances. . . . Rather, what the *Gertz* language indicates is that the State's interest is not substantial relative to the First Amendment interest in *public speech*. This language is thus irrelevant to today's decision.

Id. at 761 n.7 (emphasis in original).

To this two responses can be made: first, that *Gertz* did not expressly allow recovery of presumed and punitive damages but simply did not rule them out, *see* 418 U.S. at 349; Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847 n.4 (1985), and second, that the retention in *Gertz* of the possibility of awarding punitive damages, in the context of a decision in which it was stated that the state interest in defamation law ''extends no further than compensation for actual injury,'' 418 U.S. at 349, and in which it was recognized that punitive damages ''are not compensation for injury,'' *id.* at 350, reflects a degree of confusion, reference to which may not be too instructive. It should be noted that Justice Rehnquist, writing for the Court in Keeton v. Hustler Magazine, 465 U.S. 770 (1984), expressed the view that ''[f]alse statements of fact harm both the subject of the falsehood *and* the readers of the statement,'' and therefore a state ''may rightly employ its libel laws to discourage the deception of its citizens.'' *Id.* at 776 (emphasis in original). No such view, however, was expressed in *Gertz*. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-13, 643 (1978) (''*Gertz* Court was explicit in saying that the only legitimate state interest underlying the law of libel is the compensation of individuals for harm to their reputational interest'').

In focusing in *Dun & Bradstreet* on the nature of the speech at issue, Justice Powell appears to have disregarded two concerns he raised in *Gertz*. First, Justice Powell noted the "difficulty" that would be occasioned by "forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not . . . ."[26] Second, he expressed doubt as to the "wisdom of committing this task to the conscience of judges."[27] Justice Powell stated in *Dun & Bradstreet* that the Court in *Gertz* held only that "the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern."[28] It is difficult, however, to reconcile such a holding with Justice Powell's strong disapproval in *Gertz* of any judicial attempt to determine the nature of the speech at issue in a defamation action.[29] Indeed, referring to *Gertz* in *Cox Broadcasting Corp. v. Cohn*,[30] Justice Powell wrote of "[t]he Court's abandonment of the '[matter] of general or public interest' standard as the determinative factor for deciding whether to apply the *New York Times* malice standard to defamation litigation brought by private individuals."[31] Additionally, Justice Rehnquist, who joined Justice Powell's opinion in *Dun & Bradstreet*, wrote in *Time, Inc. v. Firestone*[32] that the Court in *Gertz* had "eschew[ed] a subject matter test for one focusing upon the character of the defamation plaintiff."[33]

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[26]418 U.S. at 346.

[27]*Id.*

[28]472 U.S. at 751.

[29]This apparent inconsistency was noted in the concurring opinion of Justice White, who wrote: "I had thought that the decision in *Gertz* was intended to reach cases that involve any false statements of fact injurious to reputation . . . whether or not [the statement] implicates a matter of public importance," 472 U.S. at 772, and in the dissenting opinion, wherein Justice Brennan wrote: "One searches *Gertz* in vain for a single word to support the proposition that limits on presumed and punitive damages obtained only when speech involved matters of public concern. *Gertz* could not have been grounded in such a premise. Distrust of placing in the courts the power to decide what speech was of public concern was precisely the rationale *Gertz* offered for rejecting the *Rosenbloom* plurality approach." *Id.* at 785 n.11.

[30]420 U.S. 469 (1975).

[31]*Id.* at 498 n.2 (Powell, J., concurring) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974)).

[32]424 U.S. 448 (1976).

[33]*Id.* at 456. If the apparent holding of *Gertz* can so easily change shape, one wonders whether the rest of the opinion can be relied on with any degree of confidence. One part of the opinion that has taken on importance is the paragraph in which Justice Powell wrote that "[u]nder the First Amendment there is no such thing as a false idea." 418 U.S. at 339. This dictum has been taken by a majority of the circuit courts to mean that a statement of opinion can never be actionable in a defamation case. *See, e.g.*, Janklow v. Newsweek, Inc., 759 F.2d 644, 649 (8th Cir. 1985); Ollman v. Evans, 750 F.2d 970, 974 n.6 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); Note, *The Fact-*

Apparent inconsistency aside, it is evident that *Dun & Bradstreet* is an important decision in the Court's ongoing struggle to balance reputational interests with first amendment interests. In the decade following *New York Times Co. v. Sullivan*, the Court issued a series of opinions which consistently increased the protection accorded defendants in defamation actions. In *Garrison v. Louisiana*,[34] the Court extended the *New York Times* privilege to cases involving criminal libel; as stated above, in *Curtis Publishing Co. v. Butts*,[35] the Court extended the privilege to cases brought by "public figures". In *St. Amant v. Thompson*,[36] the Court held that *New York Times* "malice" was not to be found absent a determination that the defendant entertained serious doubts as to the truth of the communication; in *Rosenbloom v. Metromedia, Inc.*,[37] the Court applied the privilege in a case involving a private plaintiff. More recently, however, the Court has shown a tendency to restrict the protection accorded defamation defendants. In *Gertz*, for example, the Court narrowly applied the "public figure" test to the facts before it, and held that a private plaintiff needs to show only negligence in order to recover in a defamation case.[38] In *Herbert v. Lando*,[39] the Court held that the first amendment did not require a privilege against inquiries into the editorial processes of a press defendant in a defamation case. In both *Keeton v. Hustler Magazine* [40] and *Calder v. Jones*,[41] the Court ruled against defendants who had challenged the jurisdiction of the states in which suit had been brought, and in doing so increased the ability of a defamation plaintiff to sue an out of state publisher in the plaintiff's home state. Now, in *Dun & Bradstreet*, the Court has seized upon a

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Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule, 72 GEO. L. J. 1817 (1984). Justices Rehnquist and White, however, have taken the position that the Court in *Gertz* did not intend to supplant the common law and hold that no opinion is actionable. Miskovsky v. Oklahoma Publishing Co., 459 U.S. 923 (1982) (Rehnquist, J., dissenting). *See also* Ollman v. Evans, 471 U.S. 1127, 1129 (1985) (Rehnquist, J., dissenting). Support for this position lies in the observation by Professor Anderson that in Old Dominion Branch 496, Nat'l Association of Letter Carriers v. Austin, 418 U.S. 264 (1974), a case which was decided on the same day as was *Gertz* and in which the speech at issue was arguably a statement of opinion, Justice Powell would have held the defendant liable. *See* Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 452 n.150 (1975).

[34]379 U.S. 64 (1964).

[35]388 U.S. 130 (1967).

[36]390 U.S. 727 (1968).

[37]403 U.S. 29 (1971).

[38]*See* Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 221-223 (1976).

[39]441 U.S. 153 (1979).

[40]465 U.S. 770 (1984).

[41]465 U.S. 783 (1984).

distinction, the subject matter of the speech at issue, to restrict further the protection given defendants in defamation actions.

The reasoning utilized by Justice Powell in *Dun & Bradstreet* could result in additional limits on the protection afforded defendants in such actions. For example, the Court in future cases could hold that the abolition in *Gertz* of strict liability in defamation actions does not apply where the speech complained of is not of public concern, at least where the plaintiff is a private figure. Justice Powell's opinion in *Dun & Bradstreet* itself has already been interpreted as so holding by a panel of the Fourth Circuit.[42] Also, Justice White, concurring in *Dun & Bradstreet*, wrote: "Although Justice Powell speaks only of the inapplicability of the *Gertz* rule with respect to presumed and punitive damages, it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this."[43]

Despite the reasoning of the Fourth Circuit panel and Justice White, however, it does not necessarily follow from *Dun & Bradstreet* that the states may now impose strict liability on defendants in defamation actions in which private plaintiffs are complaining of speech not of public concern. Such is the case for at least two reasons. First, one of the bases for the result reached by Justice Powell in *Dun & Bradstreet* was the fear, long expressed in the common law, that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact."[44] No such serious concern has been expressed, however, either by Justice Powell or in the common law, regarding the burden a defamation plaintiff faces in proving fault on the part of a defendant. If the Court is satisfied that proving negligence on the part of defendants in defamation cases is not an unduly difficult task, then retention by the Court of the *Gertz* prohibition of strict liability in these cases would not be inconsistent with *Dun & Bradstreet*.

Second, it appears that the Court in *Gertz* used different tests to determine the type of damages that should be awarded and the applicable standard of liability. Justice Brennan noted in his dissent in *Dun &*

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[42]Mutafis v. Erie Insurance Exchange, 775 F.2d 593 (4th Cir. 1985).

[43]472 U.S. at 773-74.

[44]*Id.* at 760 (quoting W. PROSSER, THE LAW OF TORTS § 112 at 765 (4th Ed. 1971)). *See also id.* at 2951 (White, J., concurring) (Showing of actual damage "a burden traditional libel law considered difficult, if not impossible, to discharge"); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.30 at 468 (1956) ("Actual damage to reputation may be suffered although the plaintiff may be unable to prove it. By the very nature of the harm resulting from defamatory publications, it is frequently not susceptible of objective proof. Libel and slander work their evil in ways that are invidious and subtle").

Bradstreet that the Court in *Gertz* had reached its decision regarding the propriety of presumed and punitive damages by applying an overbreadth analysis, not a balancing test.[45] The holding in *Gertz* regarding the proper standard of liability, however, was clearly the result of Justice Powell's balancing test and his desire to find an "equitable boundary between the competing concerns" of personal integrity and free expression.[46] It could be that *Dun & Bradstreet* signals the Court's desire to utilize balancing for both the question of proper damages and the question of the proper standard of liability in defamation cases. On the other hand, if Justice Powell had meant in *Dun & Bradstreet* to abolish the overbreadth analysis of *Gertz* in favor of a balancing test, one would think that he would have expressed his intentions. In sum, it is not clear that the Court has rejected the overbreadth analysis used in *Gertz* to determine the proper damages to be awarded in defamation cases. Therefore, it does not necessarily follow from *Dun & Bradstreet* that the states are now free to impose increased liability on defamation defendants: the Court's adjustment of one analysis would not necessarily affect the other.

If, however, the Fourth Circuit and Justice White are correct, then *Dun & Bradstreet* could mark a significant step in the recent series of Supreme Court opinions reducing the protection given defendants in defamation cases. Indeed, the Court could even use *Dun & Bradstreet* as the basis for eliminating *New York Times* protection for defendants in cases where a public figure or a public official complains of speech adjudged not to be of public concern. In such a case, the weight on both sides of the balance, *i.e.*, the state's interest in protecting the reputation of one who has "assumed the risk" of negative comment by entering the public arena and who presumably has greater than average access to channels of communication through which he can rebut such comment, and the first amendment interest in protecting speech not of public concern, would be reduced. The question would be the relative scope of the reductions, and the outcome could be a requirement that

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[45]472 U.S. at 794. Justice Brennan wrote that the Court in *Gertz* had reached its conclusion as to the propriety of awarding presumed and punitive damages "not . . . by weighing the strength of the state interest against strength of the First Amendment interest. Rather, the Court recognized and applied the principle that regulatory measures that chill protected speech be no broader than necessary to serve the legitimate state interest asserted." *Id.* In *Gertz*, Justice Powell had written: "It is . . . appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." 418 U.S. at 349.

[46]418 U.S. at 347-48.

a plaintiff in such a case need only show negligence to recover,[47] or a rule that a plaintiff in such a case may recover without proving any fault at all on the part of the defendant.[48]

Such a development would be significant, but not surprising. Indeed, Justice Goldberg, who with Justices Douglas and Black was of the opinion that no liability whatsoever could be imposed on one commenting on the public conduct of a public official, distinguished in his concurring opinion in *New York Times* between a defamatory statement concerning a public official's public conduct and one concerning an official's private conduct, stating that the latter "has little to do with the political ends of a self-governing society."[49] Therefore, wrote Justice Goldberg, "[t]he imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment."[50] Justice Brennan made substantially the same point in *Rosenbloom v. Metromedia, Inc.*,[51] and the Court in *Monitor Patriot Co. v. Roy*[52] left open the question "whether there remains some exiguous area of defamation against which a candidate may have full recourse . . . ."[53] Since the Court is now willing to consider both the nature of the speech and the nature of the plaintiff in defamation cases, this is a question that may soon have to be answered.

An affirmative answer by the Court might have little effect on defamation actions brought by public officials. After establishing the

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[47]The writers of the RESTATEMENT have taken the position that a public official or public figure who complains of speech "in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity" need only show negligence on the part of the defendant to recover damages. RESTATEMENT (SECOND) OF TORTS § 580B (1975). This section was written when it appeared from *Gertz* that the Court had rejected the imposition of strict liability on defendants in defamation cases of any sort.

[48]Such a rule would be the converse of *Rosenbloom*: A finding that the speech at issue was not of public concern would make possible the imposition of strict liability on the defendant, whereas in *Rosenbloom* a finding that the speech at issue was of public concern resulted in *New York Times* protection for the defendant. In addition, under such a rule the question whether to impose strict liability on the defendant or grant the defendant *New York Times* protection would rest solely on a determination of the nature of the speech at issue, which is exactly what Justice Powell disapproved of in *Gertz*. 418 U.S. at 346.

[49]376 U.S. at 301 (Goldberg, J., concurring).

[50]*Id.* at 301-02. Judge Wright expressed a similar view: "[W]here the subject matter of the alleged libel against a public official is a private affair, the rule should be different since here the need for free and unfettered discussion is greatly diminished if not nonexistent." Wright, *supra* note 23, at 639.

[51]Justice Brennan wrote: "[S]ome aspects of the lives of even the most public men fall outside the area of matters of public or general concern." 403 U.S. at 48.

[52]401 U.S. 265 (1971).

[53]*Id.* at 275. A candidate for public office is perhaps the least favored libel plaintiff; as Justice Powell wrote in *Monitor Patriot*, "it can hardly be doubted that the constitutional guarantee [of freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id.* at 272.

New York Times privilege, the Court was quick to indicate that there would be few cases in which the privilege would not apply where the speech concerned a public official.[54] In *Garrison v. Louisiana*, for example, the Court reasoned that since "[t]he public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants . . . . anything which might touch on an official's fitness for office is relevant" and therefore protected by the *New York Times* standard of proof.[55] In *Monitor Patriot*, the Court held "as a matter of constitutional law that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule of *New York Times Co. v. Sullivan*."[56]

It is more likely that speech concerning some public figures would be considered not to be of public concern. In *Gertz*, the Court identified two types of public figures: one whose fame is so pervasive that he is a public figure "for all purposes and in all contexts,"[57] and, "[m]ore commonly . . . [one who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."[58] Although the matter is not free from doubt,[59]

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[54]One such case is Aku v. Lewis, 52 Haw. 366, 477 P.2d 162 (1970), wherein the Supreme Court of Hawaii wrote that the plaintiff, a police officer, would normally be considered to be a public official, but that since the speech at issue concerned the plaintiff's involvement as the coach of a youth football team rather than his duties as a police officer, his "activities were not within the purview of [*New York*] *Times* . . . ." 52 Haw. at 375, 477 P.2d at 168.

[55]379 U.S. at 77. Garrison, who was the Orleans Parish district attorney, had charged eight judges of the Orleans Parish criminal court with laziness and inefficiency, and had suggested that the judges were subject to "racketeer influences." *Id.* at 66.

[56]401 U.S. at 277. Such a broad construction of what is of public interest was suggested by Alexander Meiklejohn, who wrote:

> In cases of private defamation, one individual does damage to another by tongue or pen; the person so injured in reputation or property may sue for damages. But, in that case, the First Amendment gives no protection to the person sued. His verbal attack has no relation to the business of governing. If, however, the same verbal attack is made in order to show the unfitness of a candidate for governmental office, the act is properly regarded as a citizen's participation in government. It is, therefore, protected by the First Amendment.

A. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 259.

The Court's newfound desire to examine the content, form, and context of speech when deciding whether the speech is of public concern, discussed *infra* notes 79 to 114, could result in a narrower view of what speech is protected by the *New York Times* privilege, even when the speech concerns a public official. *See infra* note 111.

[57]418 U.S. at 351.

[58]*Id.*

[59]*See* Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 917-19 (1984); Daniels, *Public Figures Revisited*, 25 WM. & MARY L. REV. 957, 962-68 (1984). In Carson v.

it appears that members of the first category could include movie stars, athletes, and others whose connection with the affairs of government is minimal. A court could easily conclude that a statement which would be of public concern if made concerning a United States Senator would not be of public concern if made concerning Pee Wee Herman.[60] As to "limited purpose" public figures, it is apparent that statements concerning issues other than those for which such a person is a public figure could be held not to be of public concern.[61] It is therefore possible that the Court's reinjection into defamation cases of the question whether the speech at issue is of public concern will have an effect on cases involving a variety of issues other than those before the Court in *Dun & Bradstreet*, and if there was any doubt after *Dun & Bradstreet* as to the strength of the Court's renewed interest in testing the nature of the speech at issue in defamation cases, it was likely dispelled by the Court's decision, handed down ten months after *Dun & Bradstreet*, in *Philadephia Newspapers, Inc. v. Hepps*.[62]

III. The *Philadelphia Newspapers* Case

In *Philadelphia Newspapers*, the principal stockholder of a corporation that franchised convenience stores sued the Philadelphia Inquirer in Pennsylvania state court for defamation, based on a series of articles that suggested that the plaintiff was connected to organized crime and had used his connections to gain favorable treatment for his business from members of the state government. At the close of evidence, the trial judge deemed unconstitutional the Pennsylvania statute which placed on the defendant the burden of proof as to the truth of the publication, and the judge therefore instructed the jury that the plaintiff bore the burden of proof on the issue. The jury awarded no damages, and the plaintiff brought a direct appeal to the Pennsylvania Supreme Court, which held

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Allied News Co., 529 F.2d 206 (7th Cir. 1976), the court wrote that Johnny Carson was an all purpose public figure. Carson certainly fits the *Gertz* description of a public figure who has greater than average access to "channels of effective communication" through which to rebut false allegations, 418 U.S. at 344, and who has assumed the risk of negative comment. However, the Court in *Gertz* also noted that public figures "assume special prominence in the resolution of public questions," 418 U.S. at 351, a category into which Carson does not fall so easily.

[60]For example, a charge of laziness or inefficiency on the part of a public official would certainly be more likely to be considered of public concern than the same charge leveled at a movie star.

[61]*See, e.g.*, Dameron v. Washington Magazine, Inc., 779 F.2d 736 (D.C. Cir. 1985) (air controller public figure only as to discussions of plane crash); McDowell v. Paiewonsky, 769 F.2d 942 (3rd Cir. 1985) (architect-engineer public figure only as to issues regarding his work on public building projects).

[62]106 S. Ct. 1558 (1986).

that the statute was not unconstitutional and remanded the cause for a new trial.[63]

The United States Supreme Court reversed, in an opinion written by Justice O'Connor and joined by Justices Brennan, Marshall, Blackmun, and Powell. Seeking as always to reach an "appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances,"[64] the Court reaffirmed its position that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters,"[65] and held that, "at least where a newspaper[66] publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false."[67]

Thus, as it had in *Dun & Bradstreet*, the Court in *Philadelphia Newspapers* focused on the nature of the speech at issue in resolving the question before it; indeed, Justice O'Connor wrote that the Court's decisions since *New York Times* demonstrated "two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern."[68] This appears to be a notable departure from the rejection in *Gertz* and subsequent cases of a subject matter test; in fact, Justice O'Connor even suggested in *Philadelphia Newspapers* that the Court's decision in *Gertz* was aimed at providing " 'breathing space' . . . for true speech on matters of public concern . . . ."[69]

The fact is, of course, that after *Gertz* the Court had applied a test that only took into account the nature of the plaintiff. There is no doubt, however, that Justice O'Connor was correct in suggesting that the desire to protect speech of public concern has been one of the bases of the Court's treatment of defamation cases since *New York Times*.

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[63]506 Pa. 304, 485 A.2d 374 (1984).

[64]106 S. Ct. at 1562 (quoting Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976)).

[65]*Id.* at 1564-65 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1984)).

[66]*See infra* note 78.

[67]106 S. Ct. at 1559. Since public figures always have a heavier burden than do private figures in libel cases, the Court's holding must also apply to public figure plaintiffs. The actual holding in *Philadelphia Newspapers* was not unexpected; as Justice O'Connor noted, the Court had in previous cases indicated that the burden of proof on the issue of truth or falsity should be on the plaintiff, 106 S. Ct. at 1561, 1563, and a number of courts had already shifted the burden of proof on this issue. *See, e.g.*, Tavoulareas v. Piro, 759 F.2d 90 (D.C. Cir. 1985), *rev'd on other grounds*, 817 F.2d 762 (D.C. Cir. 1987) (en banc); Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371 (6th Cir. 1981), *cert. granted*, 454 U.S. 962 (1981), *cert. dismissed*, 454 U.S. 1130 (1981); *see also* Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825 (1984); Eaton, *supra* note 18 at 1384 n.151.

[68]106 S. Ct. at 1563.

[69]*Id.* at 1565.

The stated purpose of the *New York Times* privilege, and of its extension to cases involving suits brought by public figures, was "to protect speech that matters."[70] The Court has consistently expressed its view that the speech that matters the most is speech on issues of public concern.[71] Thus, when the Court in *New York Times* prohibited a public official from recovering damages for defamatory speech relating to his official conduct unless he could prove, by clear and convincing evidence, the existence of "malice", it did so to protect "freedom of expression upon public questions . . . ."[72] When the Court extended the *New York Times* rule to suits brought by public figures, it did so because " 'public figures,' like 'public officials,' often play an influential role in ordering society," and "freedom of the press to engage in uninhibited debate about their involvement in public issues and events is . . . crucial . . . ."[73] When the Court subjected candidates for public office to the burden of the *New York Times* rule, it did so because of the need for the

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[70]Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974). Or, in the words of Meiklejohn, to ensure that "everything worth saying shall be said." A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948).

[71]*See* New York Times Co. v. Sullivan, 376 U.S. at 273 (1964) (such speech within "the central meaning of the First Amendment"); First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (speech on matters of public concern "at the heart of the First Amendment's protection"); Garrison v. Louisiana, 379 U.S. at 74-75 ("speech concerning public affairs . . . is the essence of self-government"); Carey v. Brown, 447 U.S. 455, 467 (1980) (political discussion occupies "highest rung of the hierarchy of First Amendment values"). *See also* Lorain Journal Co. v. Milkovich, 106 S. Ct. 322, 329 (1985) (Brennan, J., dissenting) (Court's decisions involving the *New York Times* standard "rest at bottom on the need to protect public discussion about matters of legitimate public concern"); *Dun & Bradstreet*, 472 U.S. 749, 756 (1985) (every case in which the Court has placed constitutional limits on state defamation law has involved "expression on a matter of undoubted public concern"); Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 40-41 (1983).

[72]376 U.S. at 269. The Court spoke of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .", and stated that the speech in question, "as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for constitutional protection." *Id.* at 270-71. *See also* Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) ("[t]here is a strong interest in debate on public issues . . . and . . . a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues").

[73]Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring). Chief Justice Warren also wrote: "In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* at 163-64.

public to gain full knowledge of the qualifications of those who seek to make public policy.[74] On the other hand, one of the bases for the Court's refusal to require private plaintiffs to prove *New York Times* "malice" has surely been the Court's view that speech about private figures tends to be of less public importance than speech about public officials and public figures.[75] This inconsistency, therefore, has not been in the Court's commitment to protecting speech on matters of public concern, but rather in the Court's attempts to secure that protection.[76]

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[74]Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

[75]*See, e.g., Dun & Bradstreet*, 472 U.S. at 780 n.5 (Brennan, J., dissenting) ("Speech allegedly defaming a private person will generally be far less likely to implicate matters of public importance than will speech allegedly defaming public officials or public figures"). It may also be that the question of whether speech is of public concern has been a factor in defamation cases involving private plaintiffs, since the general negligence analysis consists of balancing the probability and the gravity of the risk of harm with the utility of the conduct in question. *See* RESTATEMENT (SECOND) OF TORTS § 291 (1965); W. PROSSER, D. DOBBS, R. KEETON & D. OWEN, *supra* note 2, § 31 at 171. The RESTATEMENT takes the position that a defendant speaking on matters of public importance should be less likely to be found negligent than a defendant spreading gossip, since "[i]nforming the public as to a matter of public concern is an important interest in a democracy," whereas the "spreading of mere gossip is of less importance" and therefore requires more care on the part of the speaker. RESTATEMENT, *supra* note 47, § 580B, comment h. *See Smolla*, *supra* note 71, at 81-86. In addition, the *Gertz* "public figure" test, focusing as it does on whether the plaintiff has participated in a "public controversy", has necessitated inquiries which resemble those which had been necessary after *Rosenbloom*, and which seemed to have been repudiated by *Gertz*. *See Eaton, supra* note 18, at 1423-24.

[76]An example of this confusion can be found in Time, Inc. v. Firestone, 424 U.S. 448 (1976). In *Gertz* the Court had rejected the application of the *New York Times* rule to cases brought by private figures primarily because private figures have not "assumed the risk" of defamation and because they do not have easy access to channels of rebuttal. In *Firestone*, however, the Court held that the plaintiff, who seemed clearly to have assumed the risk of defamatory comment and to have access to channels of rebuttal, was a private figure because "[s]he assumed no 'special prominence in the resolution of public questions,' " that is, the matter in which the plaintiff was involved, a divorce proceeding, "is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." *Id.* at 454-55. The Court also stated its view that "the details of many, if not most, courtroom battles would add almost nothing towards advancing the uninhibited debate on public issues thought to provide principal support for the decision in *New York Times*." *Id.* at 457. Thus the Court, under the guise of applying a test focusing on the nature of the plaintiff, in fact seemed to have applied a subject matter test. Recognizing this, Justice Marshall wrote:

> If there is one thing that is clear from *Gertz*, it is that we explicitly rejected the position of the plurality in *Rosenbloom* . . . that the applicability of the *New York Times* standard depends upon whether the subject matter of a report is a matter of 'public or general concern.' . . . Having thus rejected the appropriateness of judicial inquiry into 'the legitimacy of interest in a particular event or subject,' . . . *Gertz* obviously did not intend to sanction any such inquiry by its use of the term 'public controversy.' Yet that is precisely how I

IV. Potential Repercussions of *Dun & Bradstreet* and *Philadelphia Newspapers*

There are aspects of *Dun & Bradstreet* and *Philadelphia Newspapers* that may have the unfortunate effect of increasing this confusion. For example, since the Court now recognizes both a distinction between private and public plaintiffs and a distinction between speech not of public concern and speech of public concern, every defamation case can now be placed in one of four categories. The number of possible categories had previously been limited to two.[77] Given the difficulty that courts have had with defamation cases to this point, one cannot hold too much hope of clearer and more logical results now that the number of categories into which each defamation case may be placed has been doubled.[78]

Perhaps more troubling than the increased number of categories is the reference in *Dun & Bradstreet* to *Connick v. Myers*[79] as a guide to

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understand the Court's opinion to interpret *Gertz*.

Id. at 488 (Marshall, J., dissenting). *See also* L. Tribe, *supra* note 25, § 12-13 at 644-45 (explanation for the result in *Firestone* is that the Court "decided that gossip about the rich and famous is not a matter of legitimate public interest"); Note, *Public Figures, Private Figures and Public Interest*, 30 Stan. L. Rev. 157 (1977).

[77]Justice O'Connor alluded to three of the four categories in *Philadelphia Newspapers*:

> When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.

106 S.Ct. at 1563.

[78]The problem would be twice as great if the Court distinguished between media and non-media defendants. Following Justice Powell's repeated reference in *Gertz* to the fact that the defendant in that case was a media entity, doubt existed as to whether the *New York Times* privilege applied in suits brought against non-media defendants. *See Robertson, supra* note 38, at 215-20; *Eaton, supra* note 18, at 1416-18; Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876 (1982); Restatement, *supra* note 47, § 580B comment e. The various opinions in *Dun & Bradstreet* indicated that a majority of the Court rejected this distinction. *See* 472 U.S. at 773 (White, J., concurring); *id.* at 781-84 (Brennan, J., dissenting); *see also* Garcia v. Board of Education, 777 F.2d 1403 (10th Cir. 1985) (so reading *Dun & Bradstreet*). Strangely enough, however, in *Philadelphia Newspapers* the majority opinion once again stressed the fact that the defendant was a member of the media, and already one court has read *Philadelphia Newspapers* as establishing a special proof requirement for media defendants in defamation cases. *See* Lake Shore Investors v. Rite Aid Corp., 67 Md. App. 743, 509 A.2d 727 (1986).

[79]461 U.S. 138 (1983).

determining what speech is of public concern. In that case, Myers, an assistant district attorney, had been dismissed after circulating a questionnaire among her fellow employees, seeking their views on office transfer policy, office working conditions, the trustworthiness of certain employees, the existence of political pressures in the office, and the need to establish an office grievance committee.[80] She sued Connick, the district attorney, claiming that she was fired because she had exercised her right of free speech and that the termination was therefore unconstitutional.

The Court disagreed. The task, wrote Justice White, was to strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[81] Since the Court found that the questionnaire "touched upon matters of public concern in only a most limited sense . . . [and] is most accurately characterized as an employee grievance concerning internal office policy,"[82] it held that "[t]he limited First Amendment interest involved . . . does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."[83] The termination of Myers, therefore, was not unconstitutional.

Explaining his conclusion that Myers' questionnaire was of limited public concern, Justice White wrote: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[84] It is this test that Justice Powell used to determine the nature of the speech at issue in *Dun & Bradstreet*.

It is by no means clear, however, that the Court's analysis in *Connick* is applicable to a defamation case. The Court has to this point given little indication that "speech that matters" might matter less if it is made in a certain way or in a certain context.[85] It is not immediately apparent how these considerations can affect the proper characterization of the subject matter of a given statement; "[t]he general proposition

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[80] *Id.* at 141. Her superiors were apparently of the view that Myers' activities amounted to insubordination and created a "mini-insurrection." *Id.*

[81] *Id.* at 142 (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

[82] *Id.* at 154.

[83] *Id.*

[84] *Id.* at 147-48.

[85] *See* McDonald v. Smith, 472 U.S. 479, 490 (1985) (Brennan, J., concurring) ("There is no persuasive reason for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a letter to the President of the United States"); RESTATEMENT, *supra* note 47, § 580A, comment h.

[is] that freedom of expression upon public questions is secured by the First Amendment,"[86] and it seems that the proper inquiry should focus not upon the circumstances surrounding the making of the speech but rather upon the matters at which the speech is directed.[87]

The inclusion of such considerations in the context of a case dealing with the effect that an employee's speech has on the smooth operation of a workplace is perhaps understandable. The Court in *Connick* stressed its unwillingness to create in the federal courts a massive employment review board and its hesitance to allow "every employment decision [to become] a constitutional matter."[88] The Court therefore distinguished between cases in which one speaks "as a citizen upon matters of public concern"[89] and those in which one speaks "as an employee upon matters only of personal interest,"[90] and held that expressions of the first type are entitled to much greater first amendment protection than are expressions of the second type. Thus it appears that the Court sought in *Connick* to limit the occasions on which an employee could properly claim full first amendment protection for a work-related grievance, evaluating the form and the context of the speech at issue in order to determine whether the statement was made in the speaker's capacity as an employee or as a citizen,[91] and therefore whether or not a constitutional question was raised.

There are a number of problems, however, with applying this sort of analysis to a defamation case. First, the *Connick* test is unclear.[92] Courts applying *Connick* to determine whether speech is of public concern

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[86]New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

[87]*See Connick*, 461 U.S. at 160 (Brennan, J., dissenting) (stating that "whether a particular statement by a public employee is addressed to a subject of public concern does not depend on where it was said or why"); Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 538 n.5 (1980) (when court is asked to determine whether speech is protected by the first amendment, it "must look to the content of the expression"); Young v. American Mini Theatres, Inc., 427 U.S. 50, 67 (1976) ("a common thread which [runs] through all the [Court's defamation] opinions [is] the assumption that the rule to be applied depend[s] on the content of the communication"); Yoggerst v. Hedges, 739 F.2d 293, 296 (7th Cir. 1984) ("While *Connick* mandates that we examine the content, form, and context of speech to determine whether, as a matter of law, it can be characterized as speech on a matter of public concern, we believe that the content factor is most important in making this determination").

[88]461 U.S. at 143.

[89]*Id.* at 147.

[90]*Id.*

[91]*See infra* note 103.

[92]*See* McKinley v. City of Eloy, 705 F.2d 1110, 1113-14 (9th Cir. 1983) (acknowledging difficulty courts have had in deciding when speech addresses issues of public concern); Zaky v. United States Veterans Administration, 605 F. Supp. 449, 456 (N.D. Ind. 1984), *aff'd*, 793 F.2d 832 (7th Cir. 1986) (complaining of "the confusion inherent in such a nebulous concept" as the *Connick* test).

demonstrate a reluctance to offer much more in the way of reasoning than the conclusory statement that the speech either is or is not of public concern.[93] Perhaps this is understandable, given the lack of guidelines in *Connick* itself, and the disagreement between Justices Powell and Brennan in *Connick* as to the proper scope of the category of matters of public concern, a disagreement which continued in *Dun & Bradstreet*. As long as the determination of whether speech is of public concern must be made with a test so vague (and thus manipulable) as is the *Connick* test, the danger exists that confusion, or analysis aimed at a desired result, will prevail.[94]

Also, it is unclear how much weight is to be given each of the three factors—content, form and context—in determining whether the speech at issue is of public concern. In *Connick*, the Court determined that five of the matters covered by Myers' questionnaire were not of public concern, and that one, a question whether office employees felt political pressure from their superiors, was of public concern. Thus, although the "form" and the "context" of the expressions were identical, the "content" of one caused the Court to consider it to be of public concern. Perhaps this means that speech about some subjects is of public concern regardless of any other considerations. Justice White indicated in *Connick* that a protest against racial discrimination is "a matter inherently of public concern."[95] Does this mean that an employee's speech on this

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[93]In *Philadelphia Newspapers*, for example, Justice O'Connor offered very little explanation for the conclusion that the newspaper articles at issue were of public concern. In his concurring opinion in *Dun & Bradstreet*, Justice White gave no explanation at all for his conclusion that the credit report was not of public concern, and Justice Powell rested his conclusion that the credit report was not of public concern entirely on the fact that the report was "in the individual interest of the speaker and its specific business audience," and that the report was intended for limited distribution. 472 U.S. at 762. Dissenting in *Dun & Bradstreet*, Justice Brennan complained that "the five Members of the Court voting to affirm the damage award . . . have provided almost no guidance as to what constitutes a protected 'matter of public concern.'" 472 U.S. at 786. *See also* McPherson v. Rankin, 786 F.2d 1233 (5th Cir. 1986), *aff'd*, 107 S. Ct. 2891 (1987); Anderson v. Central Point School Dist., 746 F.2d 505 (9th Cir. 1984); Rookard v. Health and Hospitals Corp., 710 F.2d 41 (2d Cir. 1983).

[94]In Pickering v. Bd. of Educ., 391 U.S. 563 (1968), Justice Marshall wrote that it would be unwise to establish a general standard by which to judge the statements of public employees, given "the enormous variety of fact situations" which could be presented to the courts by employee discharge cases. *Id.* at 569. Such a case-by-case approach was apparently approved in *Dun & Bradstreet*; responding to the dissent's suggestion that *Dun & Bradstreet* reduced first amendment protection for all credit reporting, Justice Powell wrote that "[t]he protection to be accorded a particular credit report depends on whether the report's 'content, form, and context' indicate that it concerns a public matter." 472 U.S. at 762 n.8. This is noteworthy in light of the fact that in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), Justice Powell had voiced his opposition to such case-by-case analysis, and had written in support of "broad rules of general application." *Id.* at 343-44.

[95]461 U.S. at 148 n.8. *See also* Rowland v. Mad River Local School Dist., 470 U.S.

issue would be held to be "of public concern" regardless of the circumstances surrounding the speech? If so, what other matters fall into the category of speech inherently of public concern? How does the Court's willingness to consider the form and the context of a statement square with the apparent rejection in *Dun & Bradstreet* of a distinction between media and non-media defendants? And how is the *Connick* analysis, aimed as it is at checking "the disruptive potential of speech,"[96] relevant to the protection of "uninhibited, robust, and wide-open"[97] debate which the Court has sought to ensure in previous defamation cases?

In addition, courts applying the *Connick* test display an increased willingness to find that speech is of public concern if it relates to a matter in the news or if it is made to the public at large,[98] an approach that takes into account the "newsworthiness" of the speech at issue, gives more protection to speech that is "newsworthy" than speech that is not, and thus appears to be contrary to the Court's previously expressed view that such an approach constitutes impermissible content-based regulation.[99] In *Germann v. City of Kansas City*,[100] for example, a fireman claimed that he had been passed over for promotion because of a letter he had written to the fire chief, copies of which he had sent to various city employees and to the firefighters' union. The letter, which arose out of a conflict between the union and the fire department management over the implementation of a "fire plan", accused the fire chief of "tear[ing]

1009, 1012 (1985) (Brennan, J., dissenting) (gay rights an issue inherently of public concern); Lewis v. Elliot, 628 F. Supp. 512, 521 (D.D.C. 1986) (ethics of government employee "quintessentially" matter of public concern). *See also* Mahaffey v. Kansas Bd. of Regents, 562 F. Supp. 887, 890 (D. Kan. 1983) (speech regarding plaintiff's salary increases and perquisites, his position on college organizational chart, and the identity of his superiors addressed topics that were "quintessentially items of individual, rather than public, concern").

[96]Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1013 n.6 (1985) (Brennan, J., dissenting).

[97]New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[98]*See The Supreme Court*, 1982 Term, 97 HARV. L. REV. 70, 171-72 (1983).

[99]*See* Regan v. Time, Inc., 468 U.S. 641 (1984). Such an approach would certainly seem to be antithetical to the traditional view of a content-neutral first amendment; as Professor Emerson wrote, "a classification that bases the right to first amendment protection on some estimate of how much general interest there is in the communication is surely in conflict with the whole idea of the First Amendment." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 554 (1970). Justice Brennan, dissenting in *Dun & Bradstreet*, called the view that the limited circulation of an expression might make it less a matter of public concern "dubious on its own terms and flatly inconsistent with our decision in Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979)." 472 U.S. at 795 n.18. The Court held in *Givhan* that the first amendment protection accorded the statements of a public employee is not reduced when the employee communicates the views privately rather than publicly. *Givhan*, 439 U.S. at 415-16.

[100]776 F.2d 761 (8th Cir. 1985).

the Kansas City fire department to shreds," going back on his word, and having a "pitifully twisted outlook toward the employees of the department . . . ."[101] Although the distinction between this speech and that held to involve "mere extensions of [the employee's personnel] dispute"[102] in *Connick* is not overwhelming, the Eighth Circuit Court of Appeals held that "because appellant's letter concerned implementation of the fire plan during a time of great media attention, it addressed a matter of public concern."[103] The Ninth Circuit Court of Appeals, in

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[101]*Id.* at 763.

[102]461 U.S. at 148.

[103]*Germann*, 776 F.2d at 764 n.2. In *Connick*, Justice White indicated that the speech in Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), was of public concern in part because the subject matter of the speech had been carried as a news item by the local radio station, 461 U.S. at 145-46. In Pickering v. Board of Educ., 391 U.S. 563 (1968), upon which *Connick* was based, the Court, in the course of stating that the speech at issue was of public concern, noted that the speech addressed "issues then currently the subject of public attention . . . ." *Id.* at 572. *See also* Bowman v. Pulaski County Special School Dist., 723 F.2d 640, 642 (8th Cir. 1983) (two teachers' speech regarding a fellow teacher's disciplinary methods held to be of public concern in part because the matter had drawn "a considerable amount of press coverage"); McGee v. South Pemiscot School Dist., 712 F.2d 339, 342 (8th Cir. 1983) (the fact that school board members had stated their position regarding funding for junior high school track and field in "the only newspaper in town" supported conclusion that issue was of public concern); Monsanto v. Quinn, 674 F.2d 990, 997 (3d Cir. 1982) (media coverage of an issue is evidence that matter is of public interest); Wichert v. Walter, 606 F. Supp. 1516, 1524 (D.N.J. 1985) (fact that issue "generated a banner headline" in local newspaper indicated that it was of public concern); Ferrara v. Mills, 596 F. Supp. 1069, 1074 (S.D. Fla. 1984), *aff'd*, 781 F.2d 1508 (11th Cir. 1986) (whether the subject matter of the speech at issue has drawn press attention is a factor to be considered in deciding whether it is of public concern); Collins v. Robinson, 568 F. Supp. 1464, 1468 (E.D. Ark. 1983), *aff'd*, 734 F.2d 1321 (8th Cir. 1984) (speech concerning a matter that was "a spinoff of a crowded and rather tumultuous meeting" was of public concern).

A different approach was taken recently by the Fifth Circuit in Terrell v. University of Texas System Police, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 948 (1987). In that case a captain on a university police force was fired after notes, which were critical of the chief and which were in the handwriting of the captain, were sent to the chief. The captain filed suit, claiming among other things that his dismissal was in violation of his first amendment rights. The court disagreed. The inquiry, according to the court, was not the "inherent interest or importance of the matters discussed by the employee," for "almost anything that occurs within a public agency could be of concern to the public . . . ." *Id.* at 1362. Rather, the proper inquiry was "whether the speech at issue . . . was made primarily in the plaintiff's role as citizen or primarily in his role as employee." *Id.* This approach follows from *Connick*, wherein the Court distinguished situations wherein "a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . ." 461 U.S. at 138. *See also* Pickering v. Board of Educ., 391 U.S. 563, 574 (1968) (where teacher spoke out on matter of public concern, it was "necessary to regard the teacher as the member of the general public he seeks to be"); Yoggerst v. Hedges, 739 F.2d 293, 296 (7th Cir. 1984) (speech was not of public concern where it was "clear from the content of [the] statement that

McKinley v. City of Eloy,[104] held that a police officer's speech regarding police salaries and the working relationship between the police union and city officials was of public concern and placed importance on the fact that the speech "was specifically and purposefully directed to the public both through city council meetings and a television interview."[105] This decision followed from *Connick*, wherein the Supreme Court considered the fact that the employee had not sought to publicize her complaints as a factor in its determination that the speech was of limited public concern.[106]

In addition, there seems to be a natural disinclination in cases such as *Connick* to find that the speech at issue is of public concern. As stated above, the Court has expressed its unwillingness to allow every employer-employee dispute to become a constitutional issue.[107] An obvious way to keep this from happening is to find that the speech at issue in a case is not of public concern.[108] Indeed, in *Connick* Justice

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[the employer] was speaking in her role as an employee about her personal feelings and not in her role as a citizen on a matter of public concern"). Ironically, therefore, it may be that the *Connick* analysis seeks less to determine the nature of the speech at issue than the nature of the speaker, and that the utility of the *Connick* test for determining whether speech is of public concern is limited.

[104]705 F.2d 1110 (9th Cir. 1983).

[105]*Id.* at 1115. *See also* Terrell v. University of Texas System Police, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 948 (1987) (fact that employee made no effort to communicate to the public was a factor in determination that speech at issue was not of public concern); Linhart v. Glatfelter, 771 F.2d 1004 (7th Cir. 1985) (*Connick* test necessitates inquiry into whether the speaker intended to bring matter to the attention of the public); Zaky v. United States Veteran Administration, 605 F. Supp. 449, 456 (N.D. Ind. 1984), *aff'd*, 793 F.2d 832 (7th Cir. 1986).

[106]461 U.S. at 148. Similarly, in the course of holding that the speech in *Dun & Bradstreet* was not of public concern, Justice Powell emphasized the fact that the speech was aimed at a limited audience. *See* 472 U.S. at 762.

[107]"To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149. *See supra* note 88 and accompanying text.

[108]Justice Brennan made this point in his dissent in *Connick*:

> The Court's adoption of a far narrower conception of what subjects are of public concern seems prompted by its fears that a broader view 'would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case.' . . .
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> . . . The proper means to ensure that the courts are not swamped with routine employee grievances mischaracterized as First Amendment cases is not to restrict artifically the concept of "public concern," but to require that adequate weight be given to the public's important interests in the efficient performance of governmental functions and in preserving employee discipline and harmony

White expressed the fear that to hold the speech at issue in that case to be of public concern "would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case."[109] The speech was adjudged not to be of public concern and the problem was avoided. One difficulty with this reasoning is that while its application is probably relevant to ensuring that government offices function effectively, it contravenes the very purpose of *New York Times*. To apply *Connick* to defamation cases and hold that "criticism directed at a public official" receives reduced first amendment protection[110] completely contradicts *New York Times*, which after all was directed at protecting "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[111] Moreover, courts seeking to avoid becoming deluged with employment review cases will have great incentive to find the speech at issue in the cases before them not to be of public concern, as this would discharge them from having to consider the cases further.[112] Reported opinions issued in the three years between *Rosenbloom* and *Gertz* indicate that the courts were quite willing to find that speech was of public concern.[113] The mood of the Supreme Court, however, has clearly changed, and if future cases follow the Court's suggestions as to a restrictive application of the *Connick* analysis, a body of case law narrowly defining what is a matter of public concern will be established, and the protection accorded defendants in defamation cases is likely to decrease.[114]

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sufficient to achieve that end.
461 U.S. at 163 (Brennan, J., dissenting).

Other courts and commentators have also expressed the view that *Connick* represents a restriction of the matters that will be held to be of public concern. *See, e.g.*, Ferrara v. Mills, 596 F. Supp. 1069 (S.D. Fla., 1984), *aff'd*, 781 F.2d 1508 (11th Cir. 1986); Landrum v. Eastern Kentucky Univ., 578 F. Supp. 241 (E.D. Ky. 1984); Note, *Connick v. Myers: Narrowing the Free Speech Right of Public Employees*, 33 CATH. U. L. REV. 429 (1984).

[109]461 U.S. at 149.

[110]As Justice Brennan pointed out, the speech in *Connick* could certainly have been taken to be an effort at developing information and opinions regarding the performance of the district attorney. 461 U.S. at 163. As such, the speech surely would have been protected under the rationale of *Garrison* and *Monitor Patriot*. *See supra* notes 54-56 and accompanying text. *See also* Terrell v. University of Texas System Police, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 948 (1987) (context of criticism directed at chief of university police force indicated that speech was of "wholly intragovernmental concern" and thus not of public concern.) *Id.* at 1363.

[111]376 U.S. at 270.

[112]*See infra* note 114.

[113]*See* Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 206 (1976).

[114]This danger is increased by the misapplication of the *Connick* analysis by some courts. The *Connick* analysis consists of two distinct parts: first, the court determines if

Perhaps this is what the Court had in mind in *Dun & Bradstreet* and *Philadelphia Newspapers*. Some members of the Court have recently expressed increased dissatisfaction with what they perceive to be the excessive amount of protection accorded defendants in defamation cases. For example, in *Dun & Bradstreet* Justice White and Justice Burger advocated overruling *Gertz*, based on their view that *Gertz* made it too difficult for private plaintiffs to protect their reputations. Justice White also wrote that he had "become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation."[115] Justice Burger, agreeing with Justice White's opinions as to *New York Times*, expressed the novel view that, in a case to which the *New York Times* "malice" standard applies, the jury should be instructed "that malice may be found if the defendant is shown to have published defamatory material which, in the exercise of reasonable care, would have been revealed as untrue."[116] More recently Justice Burger, in a dissent from denial of certiorari that was joined by Justice Rehnquist, reaffirmed his view, first expressed in *Dun & Bradstreet*, that *New York Times* "should be reexamined."[117]

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the speech at issue is of public concern; second, and only if the speech is determined to be of public concern, the court balances the employee's right to speak with the employer's interest in running an efficient and harmonious workplace. Some courts, however, have combined the two parts, and have considered the disruptive nature of the speech at issue in the course of determining whether it is of public concern. *See, e.g.*, Zaky v. United States Veterans Administration, 793 F.2d 832 (7th Cir. 1986); Jurgensen v. Fairfax County, 745 F.2d 868 (4th Cir. 1984); Bowman v. Pulaski County Special School Dist., 723 F.2d 640 (8th Cir. 1983); Landrum v. Eastern Kentucky Univ., 578 F. Supp. 241 (E.D. Ky. 1984). If courts deciding cases involving disruptive speech feel that they must rule that the speech is not of public concern in order to find for the employer, then once again the danger exists that precedent will develop defining narrowly what matters are of public concern.

[115]472 U.S. at 767.

[116]*Id.* at 764.

[117]Coughlin v. Westinghouse Broadcasting and Cable, Inc., 106 S. Ct. 2927 (1986). Although his views on these issues are not known, Justice Scalia has demonstrated a tendency to decide against defendants in defamation cases. In Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984), *rev'd*, 106 S. Ct. 2505 (1986), then-Judge Scalia wrote an opinion holding that the rule requiring clear and convincing evidence of *New York Times* "malice" did not apply at the summary judgment stage of a lawsuit, a decision that was reversed by the Supreme Court. In Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985), he dissented from the majority's characterization of one of the statements in the case as being a constitutionally protected expression of opinion, calling the speech a "classic and cooly crafted libel." 750 F.2d at 1036. In Tavoulareas v. Piro, 759 F.2d 90 (D.C. Cir. 1985), *rev'd*, 817 F.2d 762 (D.C. Cir. 1987) (en banc), he was in the majority reversing, as to some defendants, a judgment notwithstanding the verdict that the district court had entered in the defendants' favor.

The effect of *Gertz* was to place constitutional limits on all defamation actions. Thus a private figure complaining of speech completely unrelated to the goal of *New York Times*, that is, a citizenry informed as to the affairs of government, had at minimum to show fault on the part of the defendant. A public figure or public official complaining of such speech had to show *New York Times* "malice". In addition, such a public figure could be one far removed from the archetypical public figure, involved in the resolution of public questions, whose presence in *Butts* prompted the Court to extend the *New York Times* privilege beyond public officials;[118] a public figure could include a weight-lifting coach,[119] a bellydancer,[120] or a sports agent.[121] Perhaps the Court has decided to put a stop to the gradual expansion that has seen the *New York Times* privilege applied to cases involving issues other than those which formed the basis for the development of the privilege. As Justice Rehnquist wrote in *Bose Corporation v. Consumers Union of United States, Inc.*,[122] "[i]t is ironic . . . that a constitutional principle which originated . . . because of the need for freedom to criticize the conduct of public officials is applied here to a magazine's false statements about a commercial loudspeaker system."[123] An analysis which tests the nature of the speech in defamation cases may provide the Court with a tool with which to sharpen the analysis in these cases and make certain that constitutional protection is not applied in cases unrelated to the goals of *New York Times*. It bears repeating that in *Philadelphia Newspapers* Justice O'Connor wrote that "the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape" where a private figure complains of speech of private concern.[124] One wonders, however, at what price a more precise analysis will be obtained.

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[118]"Butts was the athletic director of the University of Georgia and had overall responsibility for the administration of its athletic program." 388 U.S. at 135. *Butts* was decided with Associated Press v. Walker, 388 U.S. 130 (1967), in which the plaintiff was a retired general who had been actively involved in issues relating to federal efforts to desegregate southern schools. Both plaintiffs, therefore, fit well into the rationale given by Chief Justice Warren for extending the *New York Times* privilege to public figures, who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* at 163-64. (Warren, C.J., concurring). *See* Schauer, *supra* note 59, at 914-17; Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 287-90.

[119]Hoffman v. Washington Post Co., 433 F. Supp. 600 (D.D.C. 1977), *aff'd*, 578 F.2d 442 (D.C. Cir. 1978).

[120]James v. Gannett Co., Inc., 40 N.Y.2d 415, 386 N.Y.S.2d 871, 353 N.E.2d 834 (1976).

[121]Woy v. Turner, 573 F. Supp. 35 (N.D. Ga. 1983).

[122]466 U.S. 485 (1984).

[123]*Id.* at 515.

[124]106 S. Ct. at 1563.

V. Conclusion

Uncertainty has attended first amendment defamation law since *New York Times*, but *Gertz* had seemed to settle a number of questions and had been reliable authority in the area for over a decade. Now the Court has injected a new set of questions and considerations into defamation cases, and the law is once more in transition. Moreover, the vital question posed in *Dun & Bradstreet*, what constitutes speech on a matter of public concern, may prove to be very difficult to answer correctly. Courts applying *Connick* have often used improper considerations in deciding whether or not speech is of public concern, and the *Connick* analysis itself seems ill-suited to producing a definition of speech of public concern that is consistent with the purposes of *New York Times*. More importantly, the Supreme Court has not promulgated any guidelines to aid lower courts and litigants in seeking to determine whether speech is of public concern. Indeed, it may be that Justice Powell was correct when he wrote in *Gertz* that the question is just too difficult to handle.[125] The courts and commentators have over the years suggested various answers, without arriving at anything resembling a consensus.[126] Perhaps the Court is to be commended for its willingness

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[125]*See supra* notes 26-29 and accompanying text. Justice Powell's statement was criticized by Justice Brennan, who wrote:

> I reject the argument that my *Rosenbloom* view improperly commits to judges the task of determining what is and what is not an issue of 'general or public interest.' I noted in *Rosenbloom* that this task would not always be easy. . . . But surely the courts, the ultimate arbiters of all disputes concerning clashes of constitutional values, would only be performing one of their traditional functions in undertaking this duty.

418 U.S. at 368-69 (Brennan, J., dissenting). *See* BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299, 357-58 (1978) (Court's decisions in obscenity cases have required line-drawing at least as difficult as that involved in deciding whether speech is of public concern).

[126]*See* T. Emerson, *supra* note 99 at 541 ("Efforts to define the concept 'public issue' in the field of libel law have been . . . fruitless"). Perhaps the most well-known attempt at an answer is that of Alexander Meiklejohn. Meiklejohn's theory, grounded on "the basic American agreement that public issues shall be decided by universal suffrage," is that the first amendment grants absolute protection to all speech which citizens need to hear so that they may properly govern themselves. A. Meiklejohn, *supra* note 70 at 27. This "public speech," Meiklejohn wrote, is that "which bears, directly or indirectly, upon issues with which voters have to deal . . . ." *Id.* at 94. Meiklejohn described as having "governing importance" education in all its phases, the achievements of philosophy and the sciences, and literature and the arts. A. Meiklejohn, *supra* note 56 at 257. Professor Chafee was of the view that the line that Meiklejohn had drawn between public speech and private speech was "extremely blurred," Chafee, *Book Review*, 62 Harv. L. Rev. 891, 899 (1949), and Professor Emerson concluded that Meiklejohn had failed to provide a satisfactory definition of public speech. Emerson, *supra* note 99, at 541. Judge Bork, while agreeing with Meiklejohn that the first amendment only protects speech of governing importance, offered a narrower definition of that speech than did Meiklejohn; in Bork's

to try to find the answer. As it stands now, however, the Court's latest

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view, only "explicitly and predominantly political speech" enjoys first amendment protection. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 26 (1971).

Meiklejohn's concerns echo those expressed in colonial times by William Bolland and James Alexander, who, according to Professor Levy,

> stressed the necessity and right of the people to be informed of the conduct of their governors so as to shape their own judgments on "Publick Matters" and be qualified to chose [sic] their representatives wisely. No one before had related the electoral process to freedom of expression—a significant advance in political and libertarian theory. The first essayist [Alexander], in depicting the wholesome influence of liberty of the press upon the formation of public opinion, also propounded the novel thesis that the "Bulk of Mankind" were quite capable of governing themselves . . . . The second essayist, in championing the "salutory effects" of "Freedom of Debate," wisely suggested that the public should be exposed to every kind of controversy, in philosophy, history, science, religion, and literature, as well as in politics, because in the course of "examining, comparing, forming opinions, defending them, and sometimes recanting them," the public would acquire a "Readiness of Judgment and Passion for Truth."

L. LEVY, LEGACY OF SUPRESSION 137-38 (1960). Similarly, the members of the Continental Congress expressed the view that a free press was vital to "the advancement of truth, science, morality and arts in general." I JOURNALS OF CONGRESS 57 (1800).

Dean Prosser defined matters of public concern as "those matters which are of legitimate concern to the community as a whole because they materially affect the interests of all the community." W. PROSSER, THE LAW OF TORTS § 110 at 812 (3rd. Ed. 1964). Professor Pedrick was of the view that the category included "all those matters as to which there is some element of public participation." Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORN. L. Q. 581, 592 (1964). The RESTATEMENT stated that

> [t]ypical facts which, as matters of public concern, may be commented upon . . . are the public acts and qualifications of public officers and candidates for office . . . the management of educational, charitable and religious institutions . . . literary, artistic and scientific productions . . . and the conduct of persons who, by special appeal or otherwise, have offered their conduct or product to the public for approval . . . ."

RESTATEMENT OF TORTS § 606 comment a (1938). Dean Green declined to venture a definition, writing that "the term . . . is not definable except in the ultimate determination in the decision of the majority of the judges who have the jurisdictional power to make the decision in a particular case." Green, *supra* note 18 at 352-53 n.47.

Members of the Court have expressed their views on the matter as well. In Thornhill v. Alabama, 310 U.S. 88 (1940), Justice Murphy wrote that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.* at 102. Justice Douglas expressed the view that freedom of speech should apply to speech "at the lower levels of science, the humanities, the professions, agriculture, and the like," Rosenblatt v. Baer, 383 U.S. 75, 90 (1966) (Douglas, J., dissenting). Justice Douglas further wrote that " 'public affairs' includes a great deal more than merely political affairs. Matters of science, economics, business, art, literature, etc., are all matters of interest to the general public. Indeed, any matter of sufficient general interest to prompt media coverage may be said to be a public affair." Gertz v. Robert Welch, Inc., 418 U.S. 323, 357-58 n.6 (Douglas, J., dissenting). In Time, Inc. v.

foray into first amendment defamation law seems to have resulted in more problems than solutions.

Hill, 385 U.S. 374 (1967), Justice Brennan expressed the view that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs," and stated that the Court had "no doubt" that the opening of a new play was a matter of public interest. *Id.* at 388. Justice Marshall, however, felt that courts should not be in the business of passing "on the legitimacy of interest in a particular event or subject; what information is relevant to self-government," since "all human events are arguably within the area of 'public or general concern.' " Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 79 (1971) (Marshall, J., dissenting).

Notes

The Retroactive Effect of *Wilson v. Garcia**

I. Introduction

42 U.S.C. § 1983[1] is a federally created individual action for "the deprivation [under the color of state law] of any rights, privileges or immunities secured by the Constitution and the laws"[2] of the United States. Because Congress did not provide section 1983 with a statute of limitations, courts follow the well established practice of "borrowing" a state statute of limitations for an analogous state claim.[3] 42 U.S.C. § 1988 is the statutory provision that directs federal courts to "borrow" a state law statute of limitations when no federal limitations period exists.[4] Federal courts had employed divergent approaches when borrowing state statutes of limitations for section 1983 actions, and in some circuits litigants had little precedential guidance upon which they could predict which state statute of limitations would govern their claim.[5] In

*The writer of this note assisted in the preparation of appellant's brief in Carpenter v. City of Fort Wayne, 637 F. Supp. 889 (N.D. Ind. 1986), vacated *sub. nom.* Baals v. City of Fort Wayne, 818 F.2d 33, while clerking for Larry J. Burke, Attorney, Fort Wayne, Indiana.

[1]Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
42 U.S.C. § 1983 (1982).

[2]*Id.*

[3]*See, e.g.*, Board of Regents v. Tomanio, 446 U.S. 478, 483-84 (1980); O'Sullivan v. Felix, 233 U.S. 318 (1914).

[4]The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States . . . so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .
42 U.S.C. § 1988 (1982).

[5]*See infra* text accompanying notes 68-120.

an effort to inject certainty and uniformity into statute of limitations selection for section 1983 claims, the U.S. Supreme Court held in *Wilson v. Garcia*[6] that all section 1983 actions should be characterized as "claims for personal injuries" for purposes of "borrowing" a state statute of limitations.[7] The Court noted the divergent approaches among the circuits, some circuits characterizing section 1983 claims as actions arising under statute,[8] others analyzing the particular facts of each case and selecting a state claim analogue for the purpose of "borrowing" a state statute of limitations.[9] After reviewing the Congressional intent behind the passage of section 1983,[10] and cataloguing the offenses section 1983 was intended to redress,[11] the Court held that "[h]ad the 42d Congress expressly focused on the issue decided, we believe it would have characterized § 1983 as conferring a general remedy for injuries to personal rights."[12] The Court reasoned that "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach."[13] Justice O'Connor, dissenting in *Wilson*, contended that abandoning the practice of "borrowing" the most analogous state claim statute of limitations for a uniform "personal injury" limitation period abandons the policy that section 1988 embodies.[14] O'Connor, recognizing that *Wilson*'s mandate for "borrowing" the forum state's "personal injury" statute of limitations will be problematic where the forum state provides more than one "personal injury" statute which could apply to a section 1983 claim,[15] stated that "[t]oday's decision does not so much resolve confusion as banish it to the lower courts."[16]

The accuracy of Justice O'Connor's prediction that *Wilson* would not resolve confusion but banish it to the lower court is borne out in the body of case law which has followed the mandate of *Wilson*. A primary issue for resolution is whether to apply *Wilson* retroactively to section 1983 claims that accrued before April 17, 1985, the day *Wilson* was decided.[17] If *Wilson* is applied retroactively to a section 1983 claim,

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[6]471 U.S. 261 (1985).

[7]*Id.* at 279.

[8]*Id.* at 278.

[9]*Id.* at 273-74.

[10]*Id.* at 267-77. "The specific historical catalyst for the Civil Rights Act of 1871 [now section 1983] was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." *Id.* at 276.

[11]*Id.* at 273.

[12]*Id.* at 278.

[13]*Id.* at 275.

[14]*Id.* at 280 (O'Connor, J., dissenting).

[15]*Id.* at 285-87.

[16]*Id.* at 286.

[17]471 U.S. at 261.

it may time-bar a complaint that may have been timely had *Wilson* not been decided.[18] Thus, if the statute of limitations applied to section 1983 claims prior to *Wilson* was five years and the forum state's personal injury statute of limitations is two years, retroactive application of *Wilson* would time-bar the plaintiff's section 1983 claim. If, however, the forum state's personal injury statute of limitations is longer than the statute of limitations formerly applied to section 1983 claims, a retroactive application would lengthen the period in which the plaintiff could bring suit.[19] In the first case, a plaintiff's reliance upon a pre-*Wilson* statute of limitations may be subverted by a retroactive application of that decision. In the latter situation, a defendant's determination that she is free of a stale claim is undermined. The Supreme Court has not granted certiorari to hear the issue of the retroactivity of *Wilson*,[20] and has not guided the lower courts in selecting which forum state's "personal injury" statute of limitations applies to a section 1983 claim when more than one state statute of limitations may apply to a "personal injury" action.[21]

Chevron Oil Co. v. Huson[22] outlines the mode of analysis federal courts should apply when addressing the retroactivity of a civil judicial decision. This Note will develop a paradigmatic analysis of *Wilson*'s

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[18]*See, e.g.*, Smith v. City of Pittsburgh, 764 F.2d 188 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 349 (1985). *See also infra* text accompanying notes 71-75.

[19]*See, e.g.*, Farmer v. Cook, 782 F.2d 780 (8th Cir. 1986) (per curiam). *See also infra* text accompanying notes 132-36.

[20]*See, e.g.*, Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 2902, 2903 (1985) (White and Marshall, J.J., dissenting) ("Given the square conflicts among the circuits, and the frequency with which these cases arise, I would grant the petition for certiorari in this case."); Rivera v. Green, 775 F.2d 1381 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1656 (1986); Wycoff v. Menke, 773 F.2d 983 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1230 (1986); Smith v. City of Pittsburgh, 764 F.2d 188 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 349 (1985).

[21]*See, e.g.*, Jones v. Preuit & Mauldin, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 893 (1986) (White, J., dissenting). In *Jones*, two Alabama statutes of limitations for "personal injury" may have applied to section 1983 claims. 106 S. Ct. at 893. *See also* Gates v. Spinks, 771 F.2d 916 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1378 (1986). In *Gates*, the Fifth Circuit rejected a six-year Mississippi statute of limitations for negligence and strict liability in favor of a one-year statute of limitations for intentional torts, finding that "[m]ost 1983 actions are predicated on intentional rather than negligent acts. . . .[i]t follows that the 1983 action is more analogous to intentional torts . . . ." 771 F.2d at 920. *But cf., e.g.*, Small v. City of Belfast, 796 F.2d 544 (1st Cir. 1986) (applying a six-year Maine statute of limitations for negligent torts). This Note will not address the problem that arises when a forum state provides more than one personal injury statute of limitations that may apply to a section 1983 action in light of *Wilson*. For a discussion of this issue, see Note, *Civil Rights: Determining the Appropriate Statute of Limitations for Section 1983 Claims*, 61 NOTRE DAME L. REV. 440 (1986); Smucker, *All Section 1983 Actions Must Apply a Single State Statute of Limitations*, 15 STETSON L. REV. 1042 (1986); Pagan, *Virginia's Statute of Limitations for Section 1983 Claims After* Wilson v. Garcia, 19 U. RICH. L. REV. 257 (1985).

[22]404 U.S. 97 (1971).

retroactivity employing the analysis outlined in *Chevron*. The Note will then analyze the decisions which have addressed the issue of *Wilson*'s retroactivity.

II. The Retroactivity of Judicial Decisions in Light of *Chevron v. Huson*

Generally, judicial decisions are applied retroactively.[23] Exceptions to the retroactivity doctrine have developed, however. *Linkletter v. Walker*,[24] a criminal law case decided in 1965, held that an earlier decision[25] requiring the exclusion of illegally obtained evidence would receive only partial retroactive effect.[26] In the context of civil cases, *Chevron Oil Co. v. Huson*[27] is the polestar case addressing the retroactivity of a judicial decision. The issue in *Chevron* was similar to the *Wilson* retroactivity issue; whether a plaintiff's claim should be time-barred when a subsequent judicial decision shortens the statute of limitations.[28] The Court in *Chevron* did not apply the shorter statute of limitations to the plaintiff's claim because the plaintiff was justified in relying upon the longer statute of limitations that was in effect when the claim accrued.[29] In reaching its decision, the *Chevron* majority

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[23]Solem v. Stumes, 465 U.S. 638, 642 (1984). For a thorough discussion of the jurisprudential theories that underlie the presumption of the retroactivity of judicial decisions, see Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 Va. L. Rev. 201 (1965); Note, *Confusion in Federal Courts: Applications of the Chevron Test in Retroactive-Prospective Decisions*, U. Ill. L. Rev. 117 (1985) [hereinafter *Confusion*]. *See also infra* note 24.

[24]381 U.S. 618 (1965). In *Linkletter*, Justice Clark traced the presumption of retroactivity to the jurisprudential philosophy of Blackstone. Justice Clark stated that under the Blackstonian model, the judge was not the creator of the law, but the discoverer of the law. When a decision was overruled, the overruling decision was not considered to be new law, but a correct application of what was and had always been the law. Thus, an overruled decision was merely a failure by the former court to divine the true law. In contrast to the Blackstonian model of jurisprudence is the Austinian view of the judicial process. John Austin posited that over time judges modified common and statutory law. The Austinian model gives courts the flexibility to overrule past decisions while still applying the older rule to cases already decided. *Id.* at 622-24.

[25]Mapp v. Ohio, 367 U.S. 643 (1961) (held that illegally obtained evidence must be excluded in state proceedings because the "due process" clause of the fourteenth amendment applies to state court proceedings).

[26]*Linkletter*, 381 U.S. at 639.

[27]404 U.S. 97 (1971).

[28]The plaintiff in *Chevron*, who had been injured on an offshore oil rig, argued that he had reasonably relied on admiralty law in gauging the timeliness of his suit. After the defendant had filed suit, the Supreme Court held in Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969), that admiralty law does not apply to personal injuries that occur upon fixed structures on the Outer Continental Shelf. In light of *Rodrique*, Louisiana law and its one-year personal injury statute of limitation [absent a retroactive application of admiralty law] would then apply to Huson's claim.

[29]404 U.S. at 100.

outlined a test to be applied in determining whether a decision should receive only prospective application:

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that 'we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation'. . . . Finally, we have weighed the inequity imposed by a retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity."[30]

Two very recent Supreme Court decisions have applied the *Chevron* analysis to the issue of a statute of limitation's retroactivity: *Goodman v. Lukens Steel Co.*,[31] and *St. Francis College v. Al-Khazraji*.[32] The *Goodman* decision extends *Wilson v. Garcia's* uniform application of the personal injury statute of limitations to section 1981 claims,[33] and using *Chevron* analysis, applied the personal injury statute of limitations retroactively.[34]

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[30]*Id.* at 106-07 (citations omitted).

[31]55 U.S.L.W. 4881 (U.S. June 19, 1987).

[32]107 S. Ct. 2022 (1987).

[33]"*Wilson*'s characterization of § 1983 claims is thus equally appropriate here [§ 1981] . . . The Court of Appeals was correct in selecting the Pennsylvania 2-year limitations period governing personal injury actions." 55 U.S.L.W. at 4882. The Court rejected the petitioners' arguments that section 1981 claims are actions for denial of economic rights because of race and should be governed by contract statute of limitations. "Section 1981 has a much broader focus than contractual rights . . . . It is thus part of a federal law barring racial discrimination, which . . . is a fundamental injury to the individual rights of a person." *Id. But see* (J.J., Brennan, Marshall, and Blackmun, dissenting) stating that section 1981 actions should be governed by state statutes of limitations for interference with contract rights. 55 U.S.L.W. at 4884.

42 U.S.C. 1981, like section 1983, does not contain a statute of limitations, so federal courts borrow an analogous state claim statute of limitations. 55 U.S.L.W. at 4882. Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1974).

[34]55 U.S.L.W. 4882-83. Both *St. Francis* and *Goodman* are cases appealed from the Third Circuit and both apply Pennsylvania law. Some discussion of the appellate court history is necessary for a fuller understanding of the cases. *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985) held on November 13, 1985 that the personal injury statute of limitations *Wilson* mandated for section 1983 claims should also be applied to section 1981 actions. 777 F.2d at 120. The appeals court in *Goodman* also held that the two-year statute of limitations was to be retroactively applied. *Id. Al-Khazraji v. St.*

III. Applying the *Chevron* Test to the Issue of *Wilson*'s Retroactivity

A. The Determination of Whether Wilson Overruled "Clear Past Precedent"

Because federal courts "borrowed" state statutes of limitations for section 1983 claims prior to *Wilson*, that decision did not address an issue of "first impression."[35] The operative question, therefore, is whether

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Francis College, 784 F.2d 505 (3d Cir. 1986), employing *Chevron* analysis, declined to apply *Goodman*'s personal injury statute of limitations retroactively because the plaintiff was justified in relying upon a longer statute of limitations when he filed suit in 1980. 784 F.2d at 513-14.

The Supreme Court announced its decision in St. Francis College v. Al-Khazraji, 107 S. Ct. at 505, on May 18, 1987, more than one month before *Goodman* was decided on June 19, 1987. 55 U.S.L.W. at 4881. *St. Francis* reserved the issue of whether the personal injury statute of limitations was to be uniformly applied to section 1981 claims, 107 S. Ct. at 2025, but upheld the lower court's finding that *Goodman* should not be applied retroactively. *Id.* at 2026. After restating the rule in *Chevron*, the court in *St. Francis* said:

> The Court of Appeals found these same factors [factors militating against retroactive application] were present in this case and foreclosed retroactive application of its decision in *Goodman*. We perceive no good reason for not applying *Chevron* where *Wilson* has required a Court of Appeals to overrule its prior case.

107 S. Ct. at 2026.

In *Goodman* the Supreme Court held that the lower court was correct in applying the personal injury statute of limitations retroactively. The Court found that "there was no clear precedent on which petitioners relied [for a six-year contract action statute of limitations] when they filed their complaint in this case in 1973." 55 U.S.L.W. at 4883. The Court, in addressing the second and third *Chevron* factors, stated:

> applying the 2-year personal injury statute, which is wholly consistent with *Wilson v. Garcia* and with the general purposes of statutes of repose, will not frustrate any federal law or result in inequity to the workers who are charged with knowledge that it was an unsettled question as to how far back from the date of filing their complaint the damages period would reach.

Id.

The *Goodman* case distinguished *St. Francis* because the precedent was clear when the plaintiff filed in 1980. 55 U.S.L.W. at 4883. The issue of *Goodman*'s retroactivity will probably be a fertile source of litigation and will require *Chevron* analysis in each case to determine the retroactive effect. It may also be argued that *Goodman* selection of the personal injury statute of limitations for section 1981 claims is not an explicit direction to federal courts to apply that limitations period to all claims, but the tenor of the case suggests otherwise. A fuller discussion of those issues is mercifully left to other commentators. These decisions came too late in the preparation of this Note, however, for a full discussion of their impact upon the issue of *Wilson*'s retroactivity.

[35]Wycoff v. Menke, 773 F.2d 983 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1230 (1986). "The issue presented to the Supreme Court in *Wilson* had not previously been addressed by that Court. The issue had, however, been addressed in virtually every circuit and this cannot realistically be considered one of 'first impression.'" *Id.* at 986 (citations omitted).

Wilson overruled "clear past precedent on which litigants may have relied."[36] The method a lower federal court employed for statute of limitations selection prior to *Wilson* may dictate whether *Wilson* overruled clear past precedent. Some circuits analyzed the factual basis of each section 1983 claim and applied the forum state's statute of limitations for a state claim analogous to the facts of the instant section 1983 action.[37] Other circuits determined that section 1983 actions have a source distinct from state law[38] and uniformly applied a statute of limitations for a "liability created by statute"[39] or a "catch-all" statute of limitations[40] to all section 1983 actions.

In circuits where the federal courts employed the factual analysis method of statute of limitations selection, clear precedent may not have existed that would have guided litigants in selecting an analogous state claim statute of limitations. Commentators have noted that unless an appellate court has ruled upon a similar fact pattern within the state where the section 1983 claim arose, there was often no clear precedent to guide litigants in predicting which state claim analogue would apply to their section 1983 action.[41] The Supreme Court in *Wilson* noted the selection of limitation periods in circuits that employed the factual analysis method often involved an arbitrary selection of one state claim analogue over another,[42] and that multiple periods of limitations may apply to

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[36]*See Chevron*, 404 U.S. at 106. *See also* Williams v. City of Atlanta, 794 F.2d 624, 627 (11th Cir. 1986); Anton v. Lehpamer, 787 F.2d 1141, 1143 (7th Cir. 1986); Rivera v. Green, 775 F.2d 1381, 1383 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1230 (1986) (all analyzing the issue of *Wilson*'s retroactivity by determining whether *Wilson* overruled "clear past precedent"). The Supreme Court has never defined "clear past precedent," but in a dissenting opinion in Milton v. Wainwright, 407 U.S. 371 (1972), Justice Stewart stated that no retroactivity-prospectivity issue arose without a "sharp break in the web of the law." *Id.* at 381 n.2 (Stewart, J., dissenting).

[37]*See* Biehler, *Limiting the Right to Sue: The Civil Rights Dilemma*, 33 DRAKE L. REV. 1, 16-27 (1983-84). *See also infra* text accompanying notes 68-120.

[38]*See* Biehler, *supra* note 37, at 27-33. *See also infra* text accompanying notes 121-61.

[39]*See* Biehler, *supra* note 37, at 4. *See also* Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986). Prior to *Wilson*, federal courts applied California statutes of limitations for "liability created by statute" uniformly to all California section 1983 actions. *Id.* at 1339.

[40]*See* Biehler, *supra* note 37, at 3. *See also* Beard v. Robinson, 563 F.2d 331, 336 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978) (applying Illinois five year "catch-all" statute of limitations for "actions not otherwise provided for" to all future section 1983 actions).

[41]*See* Biehler, *supra* note 37, at 5-6, "[u]nless the appellate court for that jurisdiction has faced the same facts within the same state, there remains no precedential guidance." *See also* Comment, *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L. J. 97, 98, "[i]n some circuits today neither plaintiffs nor defendants can know whether a federal civil rights claim is barred unless they seek a circuit decision on the facts of the case."

[42]471 U.S. at 272 n.24.

different elements of the same claim.[43] Analysis of decisions in circuits that applied the factual analysis method of statute of limitations selection prior to *Wilson* reveals that section 1983 litigants in those circuits were faced with conflicting precedent.[44]

Circuits that interpreted section 1983 as an action distinct from state law generally have provided litigants with clear precedential guidance. In these circuits federal courts applied the same statute of limitations to all section 1983 actions and litigants could reasonably assume that this same statute of limitations would apply to their claim.[45]

B. Chevron's "Purpose" Test

The second element of the *Chevron* analysis requires a court to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[46] The Supreme Court in *Wilson* stated that characterization of section 1983 actions as "personal injury" actions for purposes of borrowing a state statute of limitations furthers the "interests [of] certainty, uniformity, and the minimization of unnecessary collateral litigation."[47] *Anton v. Lehpamer*,[48] a decision that applied *Wilson* prospectively, reasoned that the *Wilson* decision serves another purpose which is that of "safeguarding the rights of federal civil rights litigants."[49]

Three general approaches have emerged in the analysis of the second *Chevron* factor: (1) *Wilson*'s interests in promoting uniformity, certainty, and the reduction of unnecessary collateral litigation[50] will be furthered by a retroactive application of the personal injury statute of limitations to future claims and those claims already pending;[51] (2) a retroactive

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[43]*Id.* at 274.

[44]*See infra* text accompanying notes 68-120.

[45]*See infra* text accompanying notes 121-61.

[46]404 U.S. at 106-07 (quoting Linkletter v. Walker, 381 U.S. 618, 629 (1965)).

[47]471 U.S. at 275.

[48]787 F.2d 1141.

[49]*Id.* at 1144.

[50]*Wilson*, 471 U.S. at 275.

[51]Wycoff v. Menke, 773 F.2d at 986-87 (8th Cir. 1985). *Accord* Williams v. City of Atlanta, 794 F.2d 624, 627-28 (11th Cir. 1986); Arvidson v. City of Mankato, 635 F. Supp. 112, 113 (D. Minn. 1986). The first approach, holding that *Wilson*'s interests in promoting uniformity, certainty, and avoiding unnecessary collateral litigation finds support in the Supreme Court's most recent *Chevron* pronouncement, Goodman v. Lukens Steel Co., 55 U.S.L.W. 4881 (U.S. June 19, 1987). *See supra* note 34. The Court in *Goodman* stated that a retroactive application of the personal injury statute to a section 1981 action is consistent with the general purposes of statutes of repose and will not frustrate any federal law. Even if *Wilson*'s (*Goodman*'s) purposes may be served by a retroactive application, the Court's refusal to apply *Goodman* retroactively to the plaintiff who

application of the personal injury statute of limitations will not retard the interests that *Wilson* promotes because the decision sought only to mandate the specific type of statute of limitations for section 1983 claims, not to require the blanket application of a uniform time period to all pending and future cases;[52] (3) a retroactive application will serve the interests that *Wilson* seeks to promote if the other *Chevron* factors direct a retroactive application.[53] The third approach, which holds that a retroactive application of *Wilson* will serve the "purpose" of that decision if the other *Chevron* factors direct a retroactive application, may actually embody the outcome-determinative reasoning that courts employ in deciding the second *Chevron* factor. In many cases where *Wilson* is retroactively applied, courts hold that a retroactive application will further *Wilson*'s interests,[54] while decisions that apply *Wilson* only prospectively often hold that a prospective application will not retard *Wilson*'s operation.[55]

C. Chevron's "Inequity" and "Hardship" Element

The third component of the *Chevron* test directs a court to "weigh the inequity imposed by a retroactive application."[56] The Supreme Court in *Chevron* stated that "[i]t would also produce the most 'substantial inequitable results' to hold that the respondent 'slept on his rights' at a time when he could not have known the time limitation that the law

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reasonably relied upon a longer statute of limitations in St. Francis College v. Al-Khazraji, 107 S. Ct. 2022, 2026 (1987) suggests the second *Chevron* factor alone is not dispositive in the retroactivity finding. In *Goodman*, the Court specifically found that all three *Chevron* factors militated in favor of a retroactive application. 55 U.S.L.W. at 4882-83.

[52]Since the personal injury statute of limitations period varies from state to state, *Wilson* merely promotes nationwide uniformity in deciding which of a state's several statutes of limitations applies in section 1983 actions. It does not secure nationwide uniformity as to the actual time within which such actions may be filed, and retroactive application in the present case would not make any appreciable contribution to such uniformity.

Ridgway v. Wapello County, Iowa, 795 F.2d 646, 648 (8th Cir. 1986). *Accord* Anton v. Lehpamer, 787 F.2d 1141, 1145 (7th Cir. 1986). Regarding *Wilson*'s interest in the reduction of unnecessary litigation, the *Anton* court stated: "[s]imilarly, the reduction of unnecessary litigation hardly seems to be affected by a nonretroactive application. The *Wilson* decision reduces litigation to the extent that, after *Wilson*, parties will no longer argue over which state statute of limitations is most analogous to their section 1983 claim." *Id.* at 1145.

[53]Smith v. City of Pittsburgh, 764 F.2d 188, 196 (3d Cir. 1985); Young v. Biggers, 630 F. Supp. 590, 592 (N.D. Miss. 1986).

[54]*See supra* notes 51 and 53.

[55]*See supra* note 52. *See also* Chris N. v. Burnsville, Minn., 634 F. Supp. 1402, 1411 (D. Minn. 1986) (non-retroactive application will not retard *Wilson*'s interests).

[56]404 U.S. at 107.

imposed upon him.''[57] Even prior to *Chevron*, courts gave rulings only prospective effect to protect people who had relied upon the existing state of the law[58] and to ensure stability of judicially created relations such as res judicata and statutes of limitation.[59]

Courts that have addressed the issue of *Wilson*'s retroactivity generally analyze the third *Chevron* factor by determining whether the plaintiff reasonably could have relied upon a statute of limitations which was longer than the forum state's personal injury statute of limitations.[60] If not, courts have held that it would not be inequitable to apply *Wilson* retroactively.[61] However, if the plaintiff could have reasonably relied upon a limitations period longer than the forum state's personal injury statute of limitations, courts have generally held that a retroactive application is inequitable.[62] The reliance interests of defendants upon statutes of limitations shorter than the forum state's personal injury limitations period have been addressed by the courts;[63] nevertheless, in cases where the defendants were justified in determining that the plaintiff's claims were time-barred, most courts have applied *Wilson* retroactively to revive the plaintiff's claims.[64] Courts have also considered the extent to which the plaintiffs have expended time and resources in the prosecution of their claims.[65]

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[57]404 U.S. at 108 (citation omitted). The *Chevron* Court cited Cipriano v. City of Houma, 395 U.S. 701 (1969), for the proposition that the Court will not apply a decision retroactively where a retroactive application will impose injustice or hardship. 404 U.S. at 107. In *Cipriano* the Court held that a Louisiana statute that allowed only property taxpayers to vote in municipal bond issuance elections violated the ''equal protection'' clause of the Fourteenth Amendment. The Court gave its decision only prospective effect, however, so the validity of securities issued prior to that decision would not be affected. 395 U.S. at 706.

[58]Currier, *supra* note 23, at 235.

[59]Moody, *The Retroactive Application of Law-Changing Decisions in Michigan*, 28 WAYNE L. REV. 439, 460 (1982).

[60]*See, e.g.*, Williams v. City of Atlanta, 794 F.2d 624, 627-28 (11th Cir. 1986); Wycoff v. Menke, 773 F.2d 983, 987 (8th Cir. 1985); Smith v. City of Pittsburgh, 764 F.2d 188, 196 (3d Cir. 1985) (plaintiff could not have reasonably relied upon a statute of limitations longer than the forum state's personal injury statute of limitations). *But see* Ridgway v. Wapello County, Iowa, 795 F.2d 646, 648 (8th Cir. 1986); Anton v. Lehpamer, 787 F.2d 1141, 1145 (7th Cir. 1986) (because the plaintiff may have reasonably relied upon a longer statute of limitations, it would be inequitable to apply *Wilson* retroactively).

[61]*See supra* note 60.

[62]*Id.*

[63]*See, e.g.*, Farmer v. Cook, 782 F.2d 780 (8th Cir. 1986); Rivera v. Green, 775 F.2d 1381 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1656 (1986); Marks v. Parra, 785 F.2d 1419 (9th Cir. 1986). *See also infra* text accompanying notes 166-84.

[64]*See* cases cited *supra* note 63, applying *Wilson* retroactively to revive the plaintiffs' time-barred complaints.

[65]*See, e.g.*, Anton v. Lehpamer, 787 F.2d 1141, 1145-46 (7th Cir. 1986); Loy v.

The vast majority of courts that have addressed the issue of *Wilson*'s retroactivity have employed the *Chevron* analysis. The Ninth Circuit, while ostensibly employing the *Chevron* test, applies *Wilson* either retroactively or prospectively, whichever result would lengthen the period in which the plaintiff may file.[66] The Sixth Circuit does not employ the *Chevron* analysis; instead, that circuit uniformly applies *Wilson* retroactively, reasoning that because the Supreme Court applied its decision retroactively in *Wilson*, the Court was impliedly mandating that *Wilson* should be retroactively applied to all cases.[67]

IV. Analysis of Circuits That Employed the Factual Analysis Method of Statute of Limitations Selection Prior to *Wilson v. Garcia*

In circuits that analyzed the facts of each section 1983 claim to find a state claim analogue for the purpose of "borrowing" a state statute of limitations, there may be no clear past precedent upon which a litigant may have relied for the proposition that a particular statute of limitations would apply to their section 1983 claim. In the Third, the Fifth, and the Eleventh Circuits, *Wilson* will generally receive retroactive application. Eighth Circuit cases that accrued prior to 1980 have also been subjected to a retroactive application of *Wilson*, because, prior to 1982, the Eighth Circuit used a factual analysis method of statute of limitations selection.[68]

A. The Third Circuit

The Third Circuit consistently used the factual analysis method of selecting statutes of limitations prior to *Wilson*.[69] Generally no clear past

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Clamme, 804 F.2d 405, 408 (7th Cir. 1986) (noting that the plaintiffs had expended considerable time and resources prosecuting their claims). *But see Smith*, 764 F.2d 188, 196 (noting that the case had not been tried nor had there been "massive discovery"). *But cf.* Gobla v. Crestwood School Dist., 628 F. Supp. 43 (M.D. Pa. 1985) where plaintiff had received a jury verdict in her favor in a section 1983 claim. While the court was considering the defendant's motion for judgment notwithstanding the verdict, *Wilson* was decided. The court requested supplemental briefing on the issue of *Wilson*'s retroactivity and granted the defendant's motion for judgment notwithstanding the verdict by applying *Wilson* retroactively to time bar the claim. *Id.* at 46.

[66]*See, e.g.*, Marks v. Parra, 785 F.2d 1419, 1419-20 (9th Cir. 1986) ("We apply *Wilson* retroactively when it has the effect of lengthening, as it does here, the limitations period.") *See also infra* text accompanying notes 162-85.

[67]*See* Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 2902 (1986). *See also infra* text accompanying notes 186-92.

[68]*See* Garmon v. Foust, 668 F.2d 400 (8th Cir. 1982) (en banc), *cert. denied*, 456 U.S. 998 (1982). In *Garmon*, the Eighth Circuit rejected the factual analysis method of characterizing section 1983 claims in favor of the uniform characterization of the section 1983 action as a "liability created by statute." *Id.* at 406.

[69]*See, e.g.*, Perri v. Aytch, 724 F.2d 362, 368 (3d Cir. 1983); Polite v. Diehl, 507 F.2d 119, 121-22 (3d Cir. 1974); Ammlung v. City of Chester, 494 F.2d 811, 814 (3d Cir. 1974).

precedent existed to foster justifiable reliance upon a particular statute of limitations for section 1983 claims.[70]

The leading retroactivity decision in the Third Circuit is *Smith v. City of Pittsburgh*.[71] In *Smith* the court applied *Wilson* retroactively to the plaintiff's section 1983 claim for wrongful discharge without due process.[72] Despite the plaintiff's contention that a six-year Pennsylvania statute of limitations should apply to his claim, the court held that at the time his claim accrued in 1979, there was no clear past precedent upon which the plaintiff could have relied for a six-year statute of limitations.[73] Regarding the "purpose" component of the *Chevron* test, the court stated that *Wilson*'s purpose of promoting uniformity and minimizing unnecessary litigation would be served by a retroactive application if the other *Chevron* factors dictated a retroactive application.[74] The court also held that it would not be inequitable to apply *Wilson* retroactively because the plaintiff could not reasonably have relied upon a statute of limitations longer than the two-year Pennsylvania personal injury limitations period and there had not been a trial or "massive discovery."[75]

In *Pratt v. Thornburgh*,[76] by contrast, the Third Circuit held that a retroactive application of *Wilson* would overrule clear past precedent and applied *Wilson* only prospectively.[77] Pratt's claim accrued in June of 1982, and before two years had elapsed, two Third Circuit decisions established that a six-year Pennsylvania statute of limitations would apply to section 1983 claims for wrongful discharge from state employment.[78]

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[70]*See* Pratt v. Thornburgh, 807 F.2d 355 (3d Cir. 1986) (holding that Knoll v. Springfield Township School Dist., 699 F.2d 137 (3d Cir. 1983), *cert. granted*, 468 U.S. 1204 (1984), *vacated per curiam*, 471 U.S. 288 (1985) in light of Wilson v. Garcia, and Perri v. Aytch, 724 F.2d 362, 368 (3d Cir. 1983), provided the plaintiff with clear past precedent upon which he could rely for a six-year statute of limitations in a section 1983 wrongful discharge from state employment action). *See also infra* text accompanying notes 76-78.

[71]764 F.2d 188 (3d Cir. 1985).

[72]*Id.* at 196-97.

[73]*Id.* at 194-95. The plaintiff argued that *Knoll*, 699 F.2d 137, and *Perri*, 724 F.2d 362, provided support for a six-year statute of limitations for wrongful discharge claims. *See supra* note 70. The *Smith* court reasoned that since *Knoll* and *Perri* were not decided until 1983, more than two years after the plaintiff's claim accrued, the plaintiff could not have relied upon those decisions and should have been on notice that the two-year Pennsylvania personal injury statute of limitations may have been applied to his claim. 764 F.2d at 195.

[74]*Smith*, 764 F.2d at 196.

[75]*Id.*

[76]807 F.2d 355 (3d Cir. 1986).

[77]*Id.* at 358.

[78]*Id.* (holding that Knoll v. Springfield Community Township School Dist., 699 F.2d 137 (3d Cir. 1983), *cert. granted* 468 U.S. 1204 (1984), and Perri v. Aytch, 724 F.2d 362, (3d Cir. 1983), provided plaintiff with clear past precedent for a six-year statute of limitations).

Thus, the plaintiff would be justified delaying filing based upon the six-year statute of limitations.[79] In analyzing the second *Chevron* factor, the *Pratt* court stated "we see no basis for thinking that a denial in the present case of retroactive operation of the rule of *Wilson v. Garcia* will adversely affect its operation in general."[80] Moreover, the *Pratt* court held that retroactive application would be inequitable because the plaintiff had been entitled to rely upon a six-year statute of limitations.[81]

Other courts in the Third Circuit have applied *Wilson* retroactively.[82] In *Fitzgerald v. Larson*,[83] the court held that *Wilson* should be applied retroactively to the plaintiff's section 1983 wrongful discharge claim that accrued in 1979. The court concluded that, as in *Smith v. City of Pittsburgh*,[84] the plaintiff could not reasonably have relied upon a six-year statute of limitations because his claim accrued in 1979.[85] In *Bartholomew v. Fischl*,[86] the plaintiff benefited from a retroactive application, the court holding that the defendants could not reasonably have relied upon a one-year Pennsylvania statute of limitations for defamation to time-bar the plaintiff's wrongful discharge claim.[87]

Courts in the Third Circuit, by carefully analyzing the precedent that section 1983 litigants may have relied upon, have correctly applied the *Chevron* test to the issue of *Wilson*'s retroactivity. The decisions to date have provided judicial relief to litigants only where their reliance upon overruled precedent was reasonable.

B. The Fifth and the Eleventh Circuits

The Fifth and the Eleventh Circuits[88] also employed the factual analysis method of statute of limitations selection prior to *Wilson v. Garcia*.[89] In *Williams v. City of Atlanta*,[90] an Eleventh Circuit case, the

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[79]*Pratt*, 807 F.2d at 358.

[80]*Id.* This conclusion is in accord with the analysis of the second *Chevron* factor in *Smith*, 764 F.2d 188, 196, because in *Pratt*, unlike *Smith*, the other *Chevron* factors favored a prospective application of *Wilson*. *See supra* note 53 and accompanying text.

[81]*Pratt*, 807 F.2d at 358.

[82]*See* Gobla v. Crestwood School Dist., 628 F. Supp. 43 (M.D. Pa. 1985), *supra* note 65. *See also* Weisman v. Insana, No. 84-0436 (E.D. Pa. July 24, 1986) (LEXIS, Genfed library, Dist. file); Wilson v. City of Philadelphia County Board of Assistance, No. 85-972 (E.D. Pa. March 20, 1986) (LEXIS, Genfed library, Dist. file).

[83]769 F.2d 160, 164 (3d Cir. 1985).

[84]764 F.2d 188.

[85]769 F.2d at 164.

[86]782 F.2d 1148 (3d Cir. 1986).

[87]*Id.* at 1155-56.

[88]The Eleventh Circuit, consisting of Alabama, Georgia, and Florida was formed from part of the Fifth Circuit on November 1, 1981.

[89]McMillan v. City of Rockmart, 653 F.2d 907, 909 (5th Cir. Unit B. Aug. 1981); McGuire v. Baker, 421 F.2d 895, 898 (5th Cir. 1970), *cert. denied*, 400 U.S. 820 (1970) (stating that courts determine the essential nature of the section 1983 claim from its facts and analogize it to a state statute of limitations).

[90]794 F.2d 624 (11th Cir. 1986).

Eleventh Circuit held that the Georgia personal injury statute of limitations should be applied retroactively to time-bar plaintiff's section 1983 claim.[91] The plaintiffs contended that a four-year Georgia statute of limitations for conversion or destruction of personal property should apply to their section 1983 claim for damage done to their home by law enforcement officials.[92] The four-year statute of limitations for property damage or conversion had never been applied to an analogous section 1983 claim. The court held that even if the most analogous state statute of limitations would have been four years, it would have been unreasonable to have relied upon that particular limitations period without precedential guidance.[93] Regarding the second *Chevron* factor, the court reasoned that subjecting all section 1983 claims to a retroactive application of the personal injury statute of limitations would serve the purposes of *Wilson*.[94] The *Williams* court also found it "would not work a 'substantial inequity' "[95] to apply *Wilson* retroactively because the plaintiffs could not have reasonably waited beyond two years to file their claim.

In another Eleventh Circuit decision, *Jones v. Preuit & Mauldin*,[96] the court stated in a footnote that the three *Chevron* factors counseled in favor of a retroactive application.[97] The defendants did not contend that *Wilson* should be applied only prospectively, the central issue in the case being which of two Alabama "personal injury" statutes of limitations was more closely analogous to the "essential nature" of a section 1983 claim.[98] The court held that a six-year statute of limitations should be applied to section 1983 actions in light of *Wilson*.[99]

In a Fifth Circuit decision, *Gates v. Spinks*,[100] the court held that *Wilson* should be retroactively applied; however, it did not engage in any *Chevron* analysis.[101] Mississippi district courts in the Fifth Circuit

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[91] *Id.* at 628.

[92] *Id.* at 626.

[93] *Id.* at 627.

[94] *Id.* at 627-28.

[95] *Id.* at 629.

[96] 763 F.2d 1250 (11th Cir.), *cert. denied*, 106 S. Ct. 1893 (1985).

[97] *Id.* at 1253 n.2.

[98] *Id.* at 1254-55. Alabama law contains two "personal injury" statutes of limitations, a six-year statute of limitations for trespass, and a one-year statute of limitations for trespass on the case. The plaintiff filed his claim 22 months after his claim accrued. *See also supra* note 21.

[99] *Id.* at 1256.

[100] 771 F.2d 916 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1378 (1986).

[101] In *Gates*, 771 F.2d at 916, as in *Jones*, 763 F.2d at 1250, the contested issue was which of two potential "personal injury" statutes of limitations would apply to section 1983 claims. The *Gates* court held that the Mississippi one-year intentional tort statute of limitations addressed a "personal injury" more analogous to the paradigmatic section

reached opposite results regarding *Wilson*'s retroactivity in *Young v. Biggers*[102] and *Stewart v. Russell*.[103] Both cases involved section 1983 claims against law enforcement officials.[104] Prior Fifth Circuit decisions held that a six-year Mississippi statute of limitations applied to section 1983 actions against public officials.[105] The *Young* court held that the *pro se* plaintiff could not reasonably have relied upon a limitations period longer than the Mississippi personal injury statute of limitations.[106] In *Stewart*, however, the court held that the plaintiff was justified in relying upon the six-year statute of limitations and applied *Wilson* only prospectively.[107] The *Stewart* court's holding that *Wilson* overruled clear past precedent is a correct result.[108] Even though the Fifth Circuit used the factual analysis method of statute of limitations selection prior to *Wilson*,[109] particular types of section 1983 actions may have recurred often enough in that circuit so that litigants will be justified in determining that their factually similar section 1983 claims will be analogized to the same state action and governed by the same limitations period.[110]

1983 claim. 771 F.2d at 919-20. *See also* Shelby v. McAdory, 781 F.2d 1053 (5th Cir. 1986) (per curiam), following *Gates* and applying the one-year Mississippi statute of limitations retroactively without *Chevron* analysis. 781 F.2d at 1054. *See also supra* note 21.

[102]630 F. Supp. 590 (N.D. Miss. 1986), aff'd, 816 F.2d 216 (5th Cir. 1987). The Fifth Circuit Court of Appeals affirmed the district court's retroactive application in Young v. Biggers, 816 F.2d 216 (5th Cir. 1987). Although the court of appeals disagreed with the district court's analysis of the *Chevron* factors, the court affirmed the decision because another Fifth Circuit panel in Shelby v. McAdory, 781 F.2d at 1053, applied the one-year statute of limitations retroactively. 816 F.2d at 217. *See supra* note 101. The court of appeals in *Young* stated: "A week before the district court issued its decision in this case a panel of this court applied *Gates* retroactively [Shelby v. McAdory, applying the one-year statute of limitations]. . . . *Shelby* is indistinguishable from this case. We cannot overrule another panel absent an overriding Supreme Court decision or change in statutory law." 816 F.2d at 217.

[103]628 F. Supp. 1361 (S.D. Miss. 1986).

[104]*Young*, 630 F. Supp. at 590; *Stewart*, 628 F. Supp. at 1361.

[105]*See* Shaw v. McCorkle, 537 F.2d 1289, 1293 (5th Cir. 1976). A subsequent decision, Morrel v. City of Picayune, 690 F.2d 469, 470 (5th Cir. 1982) (per curiam), also held that a six-year Mississippi statute of limitations applied to actions against public officials.

[106]630 F. Supp. at 590.

[107]628 F. Supp. at 1364.

[108]In *Young*, 630 F. Supp. at 590, a convicted armed robber filed a *pro se* complaint against those officials who had arrested and imprisoned him in 1980. Young's section 1983 claim, however frivolous, was an action against a public official and he may have reasonably relied upon Shaw v. McCorkle, 537 F.2d at 1293, for the proposition that a six-year statute of limitations would apply to his claim.

[109]*See supra* note 89 and accompanying text.

[110]*See, e.g.*, Pratt v. Thornburgh, 807 F.2d 355 (3d Cir. 1986) (clear past precedent for wrongful discharge claim within a factual analysis circuit). *See also supra* notes 76-81 and accompanying text.

C. The Eighth Circuit Prior to 1982

Prior to 1982, courts in the Eighth Circuit were split over the characterization of a section 1983 action for purposes of "borrowing" a state statute of limitations.[111] But in *Garmon v. Foust*,[112] decided on January 5, 1982,[113] the Eighth Circuit rejected the factual analysis method of statute of limitations selection in favor of a uniform application of a statute of limitations for "liability created by statute."[114]

In *Wycoff v. Menke*,[115] a section 1983 action that accrued in 1977, the court held that *Wilson* should be retroactively applied to the plaintiff's claim.[116] The court found that when Wycoff's claim accrued in 1977, there was conflicting precedent regarding which limitations period should apply and that the plaintiff should have been on notice that a two-year Iowa personal injury statute of limitation would apply to his claim.[117] Regarding the second *Chevron* factor, the *Wycoff* court held that a retroactive application would advance the *Wilson* interests by achieving uniformity and certainty between future and pending cases by subjecting both to the same statute of limitations and the same limitations period.[118]

Prior to *Garmon v. Foust*, Eighth Circuit section 1983 claimants were faced with conflicting precedent under the factual analysis method of statute of limitations selection and may not have reasonably relied upon a statute of limitations longer than the forum state's personal injury limitations period.[119] The court in *Wycoff v. Menke* correctly

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[111]*See, e.g.*, Glasscoe v. Howell, 431 F.2d 863 (8th Cir. 1970) (rejecting a factual analogy to a personal injury claim). *But see* Johnson v. Dailey, 479 F.2d 86 (8th Cir.), *cert. denied*, 414 U.S. 1009 (1973) (analogizing section 1983 claim to Iowa malicious prosecution action providing a two-year statute of limitations); Savage v. United States, 450 F.2d 449 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972) (analogizing plaintiff's section 1983 claim to a Minnesota state law action).

[112]Garmon v. Foust, 668 F.2d 400 (8th Cir.) (en banc), *cert. denied*, 456 U.S. 998 (1982).

[113]*Id.*

[114]*Id.* at 106 n.11. After deciding *Garmon*, the Eighth Circuit was soon confronted with the issue of *Garmon*'s retroactivity. In Occhino v. United States, 686 F.2d 1302 (8th Cir. 1982), the court held that *Garmon* would be applied retroactively because it did not overrule established precedent. 686 F.2d at 1309. This result is consistent with the court's reading of Eighth Circuit precedent in Wycoff v. Menke, 773 F.2d 983 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1230 (1986).

[115]773 F.2d at 983.

[116]*Id.* at 986.

[117]*Id.* Wycoff's claim accrued in 1977 and was filed in 1981. On January 8, 1982, the defendant moved to dismiss based upon the two-year Iowa statute of limitations. The district court denied the motion, applying *Garmon*, 668 F.2d at 400, retroactively. 773 F.2d at 984.

[118]773 F.2d at 987.

[119]*But see* cases cited *infra* note 122, applying a three-year Missouri statute of limitations for actions against public officials to section 1983 claims.

determined that it would be unjust to allow a dilatory plaintiff an extended period in which to file a claim.[120]

V. Circuits That Characterized Section 1983 As An Action Based Upon Statute

In circuits that characterized section 1983 claims as actions based upon statute, clear past precedent will exist upon which the litigants may have relied and *Wilson v. Garcia* will generally be applied only prospectively.

A. The Eighth Circuit Since 1982

Since 1982, the Eighth Circuit generally characterized section 1983 claims as actions based upon a statutory liability,[121] although courts applying Missouri law uniformly applied a three-year statute of limitations to 1983 claims for actions against public officers.[122]

In *Ridgway v. Wapello County Iowa*,[123] an Eighth Circuit panel applied *Wilson* prospectively to allow a plaintiff's section 1983 action to proceed. The plaintiff's claim accrued in 1981 and was filed two and one-half years later.[124] The court held that when *Garmon v. Foust*[125] was decided, lengthening the limitations period from two years to five years, the plaintiff still had one year of the two-year limitations period remaining in which to file.[126] The plaintiff, whose complaint would have been timely on the date that *Garmon* was decided, was then justified in delaying filing suit based upon the longer statute of limitations allowed by *Garmon*.[127] The *Ridgeway* court's analysis of the second *Chevron* factor reaches a different conclusion than that of the Eighth Circuit panel that decided *Wycoff v. Menke*.[128] In *Wycoff*, the court found that a retroactive application of *Wilson* "will achieve uniformity and certainty between future and pending cases by subjecting both to the same statute

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[120]*See also* Arvidson v. City of Mankato, 635 F. Supp. 112 (D. Minn. 1986) (no clear precedent upon which plaintiff could rely for a statute of limitations longer than Minnesota personal injury limitations period where claim accrued in 1980).

[121]*Garmon*, 668 F.2d at 406.

[122]*See, e.g.*, Buford v. Tremayne, 747 F.2d 445, 447 (8th Cir. 1984); Foster v. Armontrout, 729 F.2d 583, 585 (8th Cir. 1984); White v. Bloom, 621 F.2d 276, 280 (8th Cir.), *cert. denied*, 449 U.S. 995 (1980), 449 U.S. 1089 (1981); Green v. Ten Eyck, 572 F.2d 1233, 1239 (8th Cir. 1978).

[123]795 F.2d 646 (8th Cir. 1978).

[124]*Id.* at 647.

[125]668 F.2d at 400.

[126]795 F.2d at 647-48.

[127] The *Ridgway* court distinguished *Wycoff* because Wycoff filed his complaint before *Garmon* was decided and could not have relied upon that decision. 795 F.2d at 647.

[128]*See supra* text accompanying note 118.

of limitations and thus to the same limitations period."[129] The *Ridgway* court determined that a retroactive application in the instant case "would have only limited significance promoting the greater uniformity that the Supreme Court has sought to create in this area."[130]

An Eighth Circuit decision that did not share the thorough *Chevron* analysis of *Ridgway v. Wapello County, Iowa*[131] is *Farmer v. Cook*.[132] In *Farmer*, a retroactive application of *Wilson* lengthened the statute of limitations from three to five years. The *Farmer* court acknowledged that the result of its decision was to "revive an action that the defendants once reasonably believed barred."[133] The court reasoned that the reliance interest asserted by the defendants was weaker than the reliance interest asserted in *Wycoff v. Menke*.[134] As noted by the *Farmer* court, the defendants were justified in believing that the statute of limitations had expired.[135] This result denies the competing interest that the defendant has in justifiable reliance upon a statute of limitations that has expired.[136]

Eighth Circuit district courts[137] have generally applied *Wilson* prospectively to section 1983 claims that accrued less than two years before the 1982 *Garmon v. Foust* decision.[138]

B. The Seventh Circuit

Since 1977, the Seventh Circuit has held that a five-year statute of limitations should be uniformly applied to all section 1983 claims in

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[129]773 F.2d at 986-97.

[130]795 F.2d at 648. The *Ridgway* court stated that *Wilson* did not seek to achieve nationwide uniformity regarding the actual time in which section 1983 actions may be filed, but only uniformity in selection of which state statute of limitations would apply to section 1983 actions. *See supra* note 52 and accompanying text.

[131]795 F.2d at 646.

[132]782 F.2d 780 (8th Cir. 1986) (per curiam).

[133]*Id.* at 780.

[134]*Id.*

[135]*Id.* at 781. The *Farmer* court also stated that "[i]n *Wycoff* the effect of retroactivity was to defeat an action that a plaintiff had reasonably believed would not be barred." 782 F.2d at 781. The *Wycoff* court specifically found that Wycoff and other similarly situated plaintiffs could not have reasonably relied upon a six-year statute of limitations. 773 F.2d at 987.

[136]*Farmer*, 782 F.2d at 781.

[137]*See, e.g.*, Chris N. v. Burnsville, Minn., 634 F. Supp. 1402 (D. Minn. 1986); John Does 1-100 v. Ninneman, 634 F. Supp. 341 (D. Minn. 1986); Cook v. City of Minneapolis, 617 F. Supp. 461 (D. Minn. 1985) (The courts held *Wilson* overruled clear precedent and applied it prospectively). *But see* Richard H. v. Clay County, Minn., 639 F. Supp. 578 (D. Minn. 1986) (plaintiff filed nine months after *Wilson* was decided and the court held that it would not be inequitable to apply *Wilson* retroactively).

[138]668 F.2d at 400.

Illinois.[139] The Seventh Circuit Court of Appeals, recognizing that *Wilson* overruled clear past precedent upon which Illinois section 1983 claimants may have relied, has applied *Wilson* only prospectively.[140] In *Anton v. Lehpamer*,[141] the court held that the two-year Illinois personal injury statute of limitations should not be retroactively applied to time-bar the plaintiff's complaint. The court's holding went beyond the case at bar, however, stating that an "Illinois section 1983 claimant whose cause of action accrued before *Wilson* must file suit within the shorter period of either five years from the date his action accrued or two years after *Wilson*."[142] In analyzing the second *Chevron* factor, the court reasoned that *Wilson* sought only to achieve uniformity in the type of statute of limitations to be applied to section 1983 claims, not that a specific length of time be applied to every claim.[143] The court found that *Wilson*'s goal of uniformity was not endangered because some claims could be brought more than two years after they accrued.[144] The *Anton* court also found that the third *Chevron* factor, whether a retroactive application would be inequitable,[145] militated against retroactive application because the plaintiff may have reasonably relied upon past precedent and expended substantial resources prosecuting his claim.[146]

Illinois District Courts have uniformly applied *Wilson* prospectively. Decisions filed prior to *Anton v. Lehpamer*[147] recognized that the Seventh Circuit approach to statute of limitations selection provided litigants with clear precedential guidance.[148] A district court decision filed after

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[139]Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), *cert. denied sub nom.*, Mitchell v. Beard, 438 U.S. 907 (1978). The *Beard* court stated that by applying a uniform statute of limitations, "we avoid the often strained process of characterizing civil rights claims as common law torts." 563 F.2d at 337.

[140]Anton v. Lehpamer, 787 F.2d 1141, 1144 (7th Cir. 1986).

[141]*Id.* at 1144.

[142]*Id.* at 1146.

[143]*Id.* at 1145.

[144]*Id.*

[145]404 U.S. 97, 107 (1971).

[146]*Id.* at 1145-46.

[147]*Id.* at 1141. *Anton* was decided on April 3, 1986.

[148]*E.g.*, Wegrzyn v. Ill. Dept. of Children and Family Services, 627 F. Supp. 636 (C.D. Ill. 1986); Morre v. Floro, 614 F. Supp. 328 (N.D. Ill. 1985) *aff'd* 801 F.2d 1344 (7th Cir. 1986); Winston v. Saunders, 610 F. Supp. 176 (C.D. Ill. 1985) (applying the two-year Illinois personal injury statute of limitations retroactively). *But see* Johnson v. Arnos, 624 F. Supp. 1067 (N.D. Ill. 1985); Shorters v. Chicago, 617 F. Supp. 661 (N.D. Ill. 1985) (recognizing that *Wilson* may not apply retroactively, but selecting the same Illinois "catch-all" statute of limitations used before *Wilson* because the two-year Illinois personal injury statute of limitations was not broad enough to encompass all the injuries to "personal rights" that section 1983 contemplates). The holding in *Shorters* is criticized in Note, *Civil Rights: Determining the Appropriate Statute of Limitations for Section 1983 Claims*, 61 NOTRE DAME L. REV. 440, 446-48 (1986). This holding is specifically rejected in *Anton*, 787 F.2d at 1142.

Anton adopted *Anton*'s reasoning and applied *Wilson* prospectively.[149]

The Seventh Circuit has also extended the reasoning of the *Anton* decision to the issue of *Wilson*'s retroactivity in Indiana section 1983 claims. In *Loy v. Clamme*,[150] the court held that an Indiana plaintiff whose section 1983 claim accrued before *Wilson* must file within the shorter period of five years from the date his action accrued or two years after *Wilson*.[151] Section 1983 claims in Indiana had been subjected to two different statutes of limitations; a five-year period for actions against public officials for acts done in their official capacity,[152] and a two-year statute of limitations for personal injuries.[153] These divergent lines of analysis were never fully reconciled, but the five-year statute of limitations was generally applied when the defendants in the section 1983 action were police officers.[154] The plaintiff's action in *Loy* was a claim against law enforcement officials, and the court held that there was clear precedent on which he may have relied for the five-year statute of limitations.[155] The court in *Loy* did not limit its holding of general prospective application to only section 1983 actions against public officials, however.[156] The *Loy* holding, if followed by other courts, could reap a windfall for Indiana section 1983 plaintiffs who should have been on notice that the two-year personal injury statute of limitations may have applied to their claim.[157]

An Indiana district court decision filed before *Loy v. Clamme*[158] applied *Wilson* prospectively in *Ross v. Sommers*.[159] The court held the plaintiff was justified to rely upon the five-year statute of limitations.[160]

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[149]Cox v. Thompson, 635 F. Supp. 594 (S.D. Ill. 1986).

[150]804 F.2d 405 (7th Cir. 1986).

[151]*Id.* at 408.

[152]Blake v. Katter, 693 F.2d 677 (7th Cir. 1982); Sacks Bros. Loan Co. v. Cunningham, 578 F.2d 172 (7th Cir. 1978); Bottos v. Avakian, 477 F. Supp. 610 (N.D. Ind. 1979), *aff'd*, 723 F.2d 913 (7th Cir. 1983).

[153]Hill v. Trustees of Indiana University, 537 F.2d 248 (7th Cir. 1976). The concurring opinion noted that the Indiana two-year personal injury statute of limitations applied to section 1983 actions. *Id.* at 254, (Kunzig, J., concurring); Bell v. Metropolitan School Dist. of Shakamak, 582 F. Supp. 3 (S.D. Ind. 1983); Minority Police Officers Ass'n v. South Bend, 555 F. Supp. 921 (N.D. Ind.), *aff'd in part*, 721 F.2d 197 (7th Cir. 1983); Sturgeon v. City of Bloomington, 532 F. Supp. 89 (S.D. Ind. 1982).

[154]*See cases* cited *supra* note 152. *But cf. Sacks Bros. Loan Co.*, 578 F.2d at 172 (five-year Indiana statute of limitations for actions against public officials applied in action against township assessor in Marion County, Indiana).

[155]804 F.2d at 407-08.

[156]*Id.* at 408.

[157]*See supra* note 153.

[158]804 F.2d at 405.

[159]630 F. Supp. 1267 (N.D. Ind. 1986).

[160]*Id.* at 1270.

A Wisconsin district court applied *Wilson* only prospectively, but did not engage in its own *Chevron* analysis.[161]

VI. The "Ad Hoc" Application of *Wilson v. Garcia* in the Ninth Circuit

Prior to *Wilson*, the Ninth Circuit consistently characterized section 1983 actions as statutory liabilities and applied the forum state's statute of limitations for liability created by statute.[162] *Wilson*, therefore, will have overruled clear past precedent upon which litigants may have relied and should merit only prospective application. Ninth Circuit courts have given *Wilson* prospective effect where it will not time-bar the plaintiff's complaint, but have denied the defendant retroactive effect where pre-*Wilson* precedent would have barred the dilatory plaintiff's complaint.

In *Gibson v. United States*,[163] *Wilson* was applied prospectively to a California plaintiff's section 1983 claim. The California personal injury limitations period is one year, but the court held that *Wilson* was a clear break from the precedent upon which the plaintiff may have relied.[164] In a footnote, the *Gibson* court stated that "[o]ur result is consistent with a recent line of employee suits under [section] 301 of the Labor Management Relations Act, 1947, in which this court determined the retroactivity of an unforeseen Supreme Court redefinition of the limitations on an openly ad hoc basis, simply by gauging whether the effect was either to shorten or lengthen the governing period."[165]

This Ninth Circuit "ad hoc" approach of automatically giving the plaintiff more time to file dictated the result in an Arizona decision, *Rivera v. Green*.[166] The district court dismissed the plaintiff's complaint based upon clear pre-*Wilson* precedent providing a one-year statute of limitations.[167] The court of appeals applied *Wilson* retroactively, however, reasoning that the second and third *Chevron* factors required a retroactive

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[161]Saldivar v. Cadena, 622 F. Supp. 949 (W.D. Wis. 1985).

[162]Mason v. Schaub, 564 F.2d 308 (9th Cir. 1977); Donavan v. Reinbold, 433 F.2d 738 (9th Cir. 1970); Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962).

[163]781 F.2d 1334 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 928 (1987).

[164]*Id.* at 1339.

[165]*Id.* at 1339 n.1. The *Gibson* court cited Glover v. United Grocers, 746 F.2d 1380 (9th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985), wherein the court applied the six-month statute of limitations retroactively because it lengthened the previous limitations period. *See also* Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984). The issue in these decisions was whether the six-month statute of limitations for 301 labor cases mandated by DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) should be applied retroactively. *See also supra* note 32.

[166]775 F.2d 1381 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1656 (1986).

[167]*Id.* at 1383.

application.[168] The *Rivera* court specifically found that a retroactive application of *Wilson* would not work a substantial injustice upon the defendants.[169] The *Rivera* court also cited the line of Ninth Circuit section 301 labor cases[170] that applied the statute of limitations retroactively or prospectively, whichever would lengthen the plaintiff's filing period.[171] *Marks v. Parra*,[172] another Ninth Circuit decision applying Arizona law, followed *Rivera*'s reasoning and applied *Wilson* retroactively to lengthen the plaintiff's time in which to file.[173]

The *Rivera* court reasoned that the importance of judicial access for section 1983 claims outweighed the "disfavored statute of limitations defense."[174] Presumably, however, the one-year statute of limitations was long enough to safeguard the judicial access of Arizona 1983 litigants before *Wilson*. *Rivera* cited an Arizona appellate court decision for the proposition that the statute of limitations defense is "disfavored."[175] However, when addressing the federal court practice of "borrowing" state statutes of limitations and state law "tolling" statutes, the Supreme Court has stated that, "in general, state policies of repose cannot be said to be disfavored in federal law."[176] The Court has also recognized the importance of the statute of limitations defense to a "well-ordered judicial system."[177] In *Board of Regents v. Tomanio*,[178] the Court stated "in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred."[179] Although the accuracy of the fact-finding process may not be seriously impaired if a plaintiff filed within two years of the accrual of the complaint, as opposed to one year,[180] the settled expectation of the defendant is

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[168]*Id.*

[169]*Id.* at 1383-84.

[170]*See supra* note 165.

[171]775 F.2d at 1384.

[172]785 F.2d 1419 (9th Cir. 1986).

[173]*Id.* at 1419-20.

[174]775 F.2d at 1384.

[175]*Id.* at 1384 n.4, citing Woodward v. Chirco Construction Co., 141 Ariz. 520, 524, 687 P.2d 1275, 1279 (Ariz. Ct. App.), *aff'd as supplemented*, 687 P.2d 1269 (1984).

[176]Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980). In *Tomanio*, the Court held that New York's "tolling rule" for statutes of limitations was not inconsistent with the policies of section 1983. *Id.* at 491.

[177]446 U.S. at 478.

[178]*Id.* at 487.

[179]*Id.*

[180]One policy rationale underlying the use of statutes of limitations is the concern that the fact-finding process "may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or

subverted and a time-barred claim is revived.[181]

In an Arizona district court decision, *Breen v. City of Scottsdale*,[182] the court reached the opposite conclusion of the *Rivera* and *Marks* courts, applying *Wilson* retroactively to the plaintiff's claims that had accrued more than one year before the date of filing.[183] The *Breen* court found that the plaintiff had not been diligent in prosecuting her claim because she should have known that the statute of limitations for Arizona section 1983 claims was one year.[184]

Other Ninth Circuit district courts have recognized that *Wilson* overruled clear past precedent and have generally applied that decision prospectively.[185]

VII. Implied Retroactivity in the Sixth Circuit

The Sixth Circuit does not use the *Chevron* analysis when determining whether *Wilson* should apply retroactively. Instead, that Circuit applies *Wilson* retroactively because the Supreme Court applied its holding retroactively in the *Wilson* decision. In *Mulligan v. Hazard*,[186] the court held that *Wilson* should be applied retroactively. The *Mulligan* court did not engage in *Chevron* analysis, but reasoned that because the Supreme Court applied its holding retroactively in *Wilson*, the Court

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otherwise." United States v. Kubrick, 444 U.S. 111, 117 (1979). *See also* Burnett v. New York Central R. Co., 380 U.S. 424, 428 (1966); Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944).

[181]The Supreme Court has held that where a claim has been lost because of failure to institute an action within the statutory period, it is not revived by a subsequently enacted statute extending the period. Fullerton-Krueger Lumber Co. v. Northern Pacific Ry. Co., 260 U.S. 435, 437 (1925).

[182]39 Fair Empl. Prac. Cas. (BNA) 778 (D.C. Ariz. Aug. 5, 1985) (LEXIS, Genfed library, Dist. file). The order on August 5 was reconsidered on January 27, 1986 in Breen v. City of Scottsdale, 39 Fair Empl. Prac. Cas. (BNA) 1802 (D.C. Ariz. 1986). The retroactivity result was not modified when the case was reconsidered.

[183]39 Fair Empl. Prac. Cas. (BNA) 778.

[184]*Id.* The defendants in *Breen*, like the defendants in *Rivera*, 775 F.2d at 1383, and *Marks*, 785 F.2d at 1419, had already won dismissals prior to the *Wilson* decision based upon the one-year Arizona statute of limitations.

[185]*See, e.g.*, Bynum v. City of Pittsburg, 622 F. Supp. 196 (N.D. Cal. 1985); Estate of Cartwright v. City of Concord, Cal., 618 F. Supp. 722 (N.D. Cal. 1985) (applying *Wilson* prospectively). *See also* Cabrales v. County of Los Angeles, 644 F. Supp. 1352 (C.D. Cal. 1986) (*Wilson* applied prospectively to all of plaintiff's section 1983 claim except charge against defendant added more than one year after *Wilson* was decided). *But cf.* Gamel v. City of San Francisco, 633 F. Supp. 48 (N.D. Cal. 1986) (court recognized that *Wilson* overruled clear past precedent but held that third *Chevron* factor militated in favor of retroactive application because plaintiff unreasonably delayed bringing suit until eight months after *Wilson* was decided). For a discussion of claims which accrued before *Wilson* but were filed after that decision, *see infra* notes 212-26 and accompanying text.

[186]777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 2902 (1986).

was implicitly mandating that its holding should be retroactively applied in all cases.[187] The *Mulligan* court justified this conclusion by relying upon the analysis in an earlier Sixth Circuit decision dealing with the retroactivity of section 301 labor cases, *Smith v. General Motors*.[188] In *Smith*, the Sixth Circuit held that the *Chevron* analysis was not appropriate when the Supreme Court applied its decision retroactively to the case at bar.[189]

Other decisions in the Sixth Circuit have also followed the "implied retroactivity" mode of analysis.[190] Prior to *Wilson*, the Sixth Circuit employed the factual analysis method of statute of limitations selection for section 1983 claims.[191] Thus, even if the *Mulligan* court had applied the *Chevron* analysis, it is likely that clear past precedent would not have existed for a particular statute of limitations. However, even in factual analysis circuits, certain types of section 1983 claims may have consistently been analogized to a particular state claim, thus establishing clear past precedent.[192] Despite this fact, the Sixth Circuit's "implied retroactivity" rule will deny judicial relief to litigants who may reasonably have relied upon clear past precedent.

VIII. The Retroactivity of *Wilson* In Other Circuits

A First Circuit decision, *Small v. City of Belfast*,[193] applied *Wilson* retroactively, but selected the longer of two Maine personal injury statutes of limitations,[194] allowing the plaintiff's claim to proceed.

In the Second Circuit, a retroactive application of *Wilson* will not change the limitations period for New York and Connecticut section

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[187]*Id.* at 343-44.

[188]747 F.2d 372 (6th Cir. 1984) (en banc).

[189]*Id.* at 375. In Smith v. General Motors, 747 F.2d 372, the issue was the retroactivity of DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), a recent case which generated considerable retroactivity analysis. In *DelCostello*, the Court held that a six-month statute of limitations should be applied to combined section 301 duty of fair representation claims under the Labor-Management Relations Act of 1947. Following *DelCostello*, courts addressed the retroactivity of that decision to claims that had already accrued. *See, e.g.*, Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036 (9th Cir. 1984), *cert. denied*, 465 U.S. 1102 (1984). *See also infra* text accompanying note 165. *See also* Galant, *The Retroactivity of the Six-Month Statute of Limitations in Section 301 Cases*, 15 U. Tol. L. Rev. 935 (1984).

[190]*See, e.g.*, Fowler v. City of Louisville, 625 F. Supp. 181 (W.D. Ky. 1985), *aff'd*, 803 F.2d 719 (6th Cir. 1986).

[191]*See* Hones v. Board of Educ. of Covington, Ky., 667 F.2d 564 (6th Cir. 1982); Austin v. Brammer, 555 F.2d 142 (6th Cir. 1977).

[192]*See* Pratt v. Thornburgh, 807 F.2d 355 (3d Cir. 1986), *supra* notes 76-81 and accompanying text. *See also* Stewart v. Russell, 628 F. Supp. 1361 (S.D. Miss. 1986), *supra* notes 102-08 and accompanying text.

[193]796 F.2d 544 (1st Cir. 1986).

[194]*Id.* at 545-49.

1983 claimants because the personal injury statute of limitations to be applied in light of *Wilson* is the same number of years as the limitations period consistently applied to section 1983 actions before *Wilson*.[195] In New York the personal injury statute of limitations to be applied in light of *Wilson* is three years.[196] The limitations period previously applied to all section 1983 claims for "liability created or imposed by statute" was three years.[197] In Connecticut, the three-year intentional tort limitations period was consistently applied to section 1983 actions before *Wilson*,[198] and Connecticut district courts have held that the same intentional tort statute of limitations period will apply in light of *Wilson*.[199] The retroactivity of *Wilson* may not be an issue in Fourth Circuit cases applying Virginia law because federal courts applied the Virginia personal injury statute of limitations to section 1983 claims even prior to *Wilson*.[200]

The Tenth Circuit addressed the retroactivity of *Garcia v. Wilson*[201] on the same day that decision was handed down. In *Jackson v. City of Bloomfield*,[202] and *Abbitt v. Franklin*,[203] the Tenth Circuit held that *Garcia v. Wilson* would be prospectively applied to the plaintiff's claims. Prior to *Garcia*, the Tenth Circuit generally analogized section 1983 actions to state law claims for statute of limitations selection.[204] In some

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[195]*See infra* notes 196-98.

[196]*See* Williams v. Allen, 616 F. Supp. 653, 655 (E.D.N.Y. 1985); Ladson v. New York City Police Dept., 614 F. Supp. 878, 879 (S.D.N.Y. 1985) (three-year New York negligence action personal injury statute of limitations applies to section 1983 claims in light of *Wilson*). *But see* Doty v. Rochester City Police Dept., 625 F. Supp. 829, 830 n.1 (W.D.N.Y. 1985) (suggesting that a one-year New York statute of limitations for intentional torts might apply to section 1983 claims rather than a three-year negligence statute of limitations).

[197]Taylor v. Malone, 626 F.2d 247, 253 (2d Cir. 1980); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 449 (2d Cir. 1980); Meyer v. Frank, 550 F.2d 726, 728 (2d Cir. 1977), *cert. denied*, 434 U.S. 830 (1977) (three-year New York statute of limitations for "liability created by statute" governed section 1983 claims).

[198]Williams v. Walsh, 558 F.2d 667, 670-71 (2d Cir. 1977); Members of Bridgeport v. City of Bridgeport, 85 F.R.D. 624, 637 (D. Conn. 1980) (three-year Connecticut personal injury statute of limitations applied to all section 1983 claims).

[199]Weber v. Amendola, 635 F. Supp. 1527, 1531 (D. Conn. 1985); DiVerniero v. Murphy, 635 F. Supp. 1531, 1534 (D. Conn. 1986) (holding that Connecticut three-year statute of limitations for intentional tort should apply to section 1983 claims in light of *Wilson*).

[200]*See, e.g.*, Cramer v. Crutchfield, 648 F.2d 943, 945 (4th Cir. 1981); Almond v. Kent, 459 F.2d 200, 204 (4th Cir. 1972). *But cf.* Pagan, *supra* note 21, at 267-68 (suggesting that Virginia one-year statute of limitations for non-physical "personal injuries" may apply to section 1983 actions in light of *Wilson*).

[201]731 F.2d 640 (10th Cir. 1984) (en banc). *Garcia v. Wilson* was the decision from which *Wilson v. Garcia* was appealed. *Garcia v. Wilson* was decided on March 30, 1984.

[202]731 F.2d 652 (10th Cir. 1984).

[203]731 F.2d 661 (10th Cir. 1984).

[204]Garcia v. Wilson, 731 F.2d at 648 (citing Clulow v. Oklahoma, 700 F.2d 1291, 1299 (10th Cir. 1983); Shah v. Halliburton Co., 627 F.2d 1055, 1059 (10th Cir. 1980); Zuniga v. Amfac Foods Inc., 580 F.2d 380, 383-87 (10th Cir. 1978)).

cases, however, the Tenth Circuit characterized section 1983 wrongful discharge claims as a "liability created by statute."[205] In *Jackson v. City of Bloomfield*,[206] the plaintiffs contended that their section 1983 wrongful termination claim should be characterized as contractual and be governed by a four-year New Mexico statute of limitations for unwritten contract actions.[207] The court found that the plaintiffs were justified in relying upon the four-year statute of limitations because the Tenth Circuit had previously held that if a section 1983 action could be analogized to more than one state claim for statute of limitations selection, the longer limitations period should be applied.[208] *Abbitt v. Franklin*,[209] tracking the reasoning of *Jackson v. Bloomfield*, held that because either a two-year Oklahoma personal injury statute of limitations or a three-year limitations period "for liability created by statute" may have applied under the former Tenth Circuit mode of analysis,[210] the plaintiff was justified in relying upon the longer of the two statutes.[211]

IX. The Effect of *Wilson v. Garcia* Upon Plaintiffs Who Have Filed their Section 1983 Claims After April 17, 1985

Wilson v. Garcia was decided on April 17, 1985.[212] The bulk of the case law addressing the retroactivity of *Wilson* dealt with actions that had been filed before *Wilson* was decided. A few decisions, however, have addressed the retroactivity of *Wilson* in the context of actions that accrued before *Wilson* was decided but were filed after that decision. In *Anton v. Lehpamer*,[213] a Seventh Circuit panel held that Illinois plaintiffs whose claims accrued before April 17, 1985 must file suit within the shorter period of either five years from the date the claim accrued or two years after April 17, 1985.[214] The statute of limitations applied to section 1983 actions before *Wilson* was five years,[215] and the

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[205]731 F.2d at 649 (citing Spiegel v. School Dist. No. 1, 600 F.2d 264, 265-66 (10th Cir. 1979)).

[206]731 F.2d 652.

[207]*Id.* at 653.

[208]*Id.* at 653-55 (citing *Shah*, 627 F.2d at 1059).

[209]731 F.2d 661.

[210]*Id.* at 663-64.

[211]The *Abbitt* court found that the plaintiff may have relied upon *Spiegel*, 600 F.2d 264, for the proposition that a three-year statute of limitations for "liability created by . . . statute" would apply to his 1983 action, and that *Shah*, 627 F.2d at 1059, provided support for the proposition that the longer of two potentially applicable statutes of limitations should apply to 1983 actions. *Abbitt*, 731 F.2d at 663.

[212]471 U.S. at 261.

[213]787 F.2d 1141 (7th Cir. 1986).

[214]*Id.* at 1146.

[215]*See* Beard v. Robinson, 563 F.2d 331, 335 (7th Cir. 1977), *cert. denied sub nom.*, Mitchell v. Beard, 438 U.S. 907 (1978).

Illinois personal injury statute of limitations is two years.[216] This same time frame was adopted for Indiana section 1983 claims in *Loy v. Clamme*.[217]

A California district court in the Ninth Circuit adopted a similar approach in *Cabrales v. County of Los Angeles*.[218] The personal injury statute of limitations in California is one year,[219] and the statute of limitations consistently applied to section 1983 claims in California before *Wilson* was three years.[220] The *Cabrales* court held that a plaintiff whose section 1983 action accrued prior to *Wilson* must file within the shorter period of three years from the date his action accrued or one year after *Wilson* was decided.[221] Another Ninth Circuit district court in California has held, however, that an eight-month delay in filing after *Wilson* was decided was unreasonable and applied *Wilson* retroactively.[222]

Two Eighth Circuit district courts have split over *Wilson*'s retroactivity where the claims were filed after *Wilson* was decided. In *Chris N. v. Burnsville, Minn.*,[223] the court held that a claim filed six months after *Wilson* was decided was brought within a reasonable time.[224] But in *Richard H. v. Clay County, Minn.*,[225] the court found that a plaintiff who did not file until almost nine months after *Wilson* was decided unreasonably delayed bringing suit.[226]

X. Conclusion

The primary purpose of the *Chevron* formulation is to provide judicial protection to litigants who have justifiably relied upon the law as it existed before the overruling decision. The diverse approaches the circuit courts apply in determining the retroactivity of *Wilson v. Garcia* often deny the reasonable reliance interests of section 1983 litigants. The "ad hoc" approach of the Ninth Circuit lacks mutuality in that it

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[216] *Anton*, 787 F.2d at 1145.

[217] 804 F.2d at 405 (7th Cir. 1986). "Accordingly, we find, as in *Anton*, an Indiana 'plaintiff whose section 1983 cause of action accrued before the *Wilson* decision, April 17, 1985, must file suit within the shorter period of either five years from the date his action accrued or two years after *Wilson*.' " *Id.* at 408 (quoting *Anton*, 787 F.2d at 1146). The personal injury statute of limitations in Indiana is two years and the pre-*Wilson* statute of limitations applied to *some* section 1983 claims was five years. *See supra* notes 152-58 and accompanying text.

[218] 644 F. Supp. 1352 (C.D. Cal. 1986).

[219] *Id.* at 1354.

[220] *Id.* at 1353.

[221] *Id.* at 1356.

[222] Gamel v. City of San Francisco, 633 F. Supp. 48, 50 (N.D. Cal. 1986).

[223] 634 F. Supp. 1402 (D. Minn. 1986).

[224] *Id.* at 1413.

[225] 639 F. Supp. 578 (D. Minn. 1986).

[226] *Id.* at 581.

protects the reasonable reliance interests of plaintiffs, while denying that same protection to defendants. A fortuitous overruling decision then becomes a windfall for dilatory plaintiffs. The "implied retroactivity" test employed in the Sixth Circuit has the potential for ignoring the reliance interests of either party in a section 1983 claim. Applying *Wilson* retroactively to dilatory plaintiffs in circuits that employed the factual analysis method of statute of limitations selection comports with the *Chevron* doctrine by recognizing only the reasonable reliance interests of litigants. Although the denial of a claim by the retroactive application of *Wilson* seems harsh upon a cursory reading, the result may have been the same even if *Wilson* had not been decided because the plaintiff should have been on notice to file within the shorter of the potentially applicable periods. Any injustice that existed under the factual analysis method was already in progress before *Wilson* was decided.

The *Wilson* decision noted that one of the criticisms against the factual analysis method is that it provided little guidance for litigants to gauge the timeliness of their section 1983 claims. Cases applying *Wilson* retroactively to claims in factual analysis circuits posthumously confirm the Court's observation. A retroactive application of a decision designed to inject certainty will work no hardship upon diligent plaintiffs, it merely confirms the result which would have been reached in the absence of the overruling decision.

Justice O'Connor's prediction that the *Wilson* decision will "not so much resolve confusion as banish it to the lower courts"[227] has been amply affirmed in the wake of that decision. Absent further guidance from the Supreme Court, the confused approaches some circuits have taken to the retroactivity of *Wilson* will perpetuate the uncertainty and inequity that decision sought to rectify.

ROBERT C. FEIGHTNER

[227]Wilson v. Garcia, 471 U.S. 261, 286 (1985).

FREQUENT FLYER BENEFITS
Substantive and Procedural Tax Consequences

I. Introduction

In 1981, the airline industry developed a new marketing technique to combat increasing competition for passengers—the frequent flyer bonus program.[1] Designed to create "brand" loyalty,[2] the programs allow travelers to accrue mileage on a specific airline for the purpose of "spending" the mileage on designated awards.[3] As more mileage credits are accrued, more valuable prizes[4] become available to the program participant. The bonuses primarily take the form of free flights but can also include free hotel accommodations,[5] free use of rental automobiles[6] or even cash.[7]

In 1984, airlines reported an estimated ten million participants in frequent flyer programs.[8] In 1985, airlines reported that an estimated 100 million dollars of frequent flyer bonuses were awarded.[9] In 1986, the value of the average frequent flyer bonus was $500 while the number of reported participants had remained constant at ten million.[10] Because of the popularity of the programs,[11] it appears that the frequent flyer bonus has become a permanent economic factor in the airline industry.

An unforseen issue raised by the implementation of frequent flyer bonus programs is the taxability of the bonus awarded to the recipient.

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[1] *See, e.g.*, McNatt, *The Richer Rewards of Frequent Flying*, Money, Apr. 1985, at 89 [hereinafter *Richer Rewards*]; Sherman, *The Airlines' Flying Jackpots*, Fortune, Nov. 29, 1982, at 106 [hereinafter Sherman]; *The Sky's the Limit in Luring the Frequent Flyer*, Bus. Wk., Oct. 18, 1982, at 152 [hereinafter *Sky's the Limit*]. The term "flyer" appears in some publications as "flier." For consistency, unless directly quoting such a publication, this Note uses "flyer."

[2] *Richer Rewards*, *supra* note 1, at 89.

[3] *The Frequent Flier Game: Now Winning Is a Lot Easier*, Bus. Wk., April 2, 1984, at 93 [hereinafter *Game*].

[4] This Note will use interchangeably the terms "award," "prize" and "bonus" to refer to a frequent flyer free flight. Unless clearly indicated, the terms "prize" and "award" are not being used as technically defined by the Internal Revenue Code of 1986.

[5] McNatt, *Cashing in on New Deals for Frequent Fliers*, Money, May 1986, at 161 [hereinafter *New Deals*].

[6] United Airlines, Inc., Mileage Plus Program Guide 33 (1987).

[7] Midway Airlines, Inc., Flyers First Program (1986).

[8] *Does the Frequent-Flier Game Pay Off for Airlines?*, Bus. Wk., Aug. 27, 1984, at 74 [hereinafter *Frequent-Flier Game*].

[9] *New Deals*, *supra* note 5, at 160.

[10] *Id.*

[11] *Frequent-Flier Game*, *supra* note 8, at 74. Each airline with a frequent flyer bonus program claims the program has boosted business 20% to 35%. *Id.*

If the receipt of 100 million dollars of bonuses in 1985 had been subject to income taxation, as much as fifty million dollars of tax revenue could have been generated.[12] Furthermore, many variations of frequent flyer bonus programs are being created as other industries follow the airlines' lead. For example, several hotel chains are rewarding frequent guests with free lodging.[13] Also, AT&T has initiated "Opportunity Calling," a program that awards merchandise discounts for increased AT&T long distance telephone usage.[14] As these variations on the bonus program concept expand, the resulting tax implications compound. Therefore, taxpayers and tax professionals will increasingly be called upon to determine the taxable status of frequent flyer bonuses and their progeny.

The purpose of this Note is to examine the mechanism and background of frequent flyer bonus programs and analyze the tax effects of the receipt of a frequent flyer bonus. The first issue for resolution is whether the receipt of a bonus constitutes gross income to the recipient who paid for the flights upon which the bonus is awarded. Second, the income recognition issue will also be analyzed in light of the employment relationship, a situation in which the party who is paying for tickets, the employer, is not the individual using the free flight. Third, this Note will discuss whether bonuses, if considered to be income, are excludible under one of the exclusionary sections of the Internal Revenue Code of 1986[15] (Code). Fourth, this Note will determine whether such bonuses, when received from an employer, constitute wages subject to withholding. Finally, this Note will propose an equitable solution to the question of who should be responsible for reporting receipt of these bonuses to the Internal Revenue Service.

II. The History and Mechanics of the Bonus

For those who do not travel by air, the concept of the frequent flyer bonus is a novel one requiring further explanation and a brief history. In 1981, American Airlines implemented its AAdvantage Program, a new marketing concept, to combat the anticipated increase in competition in the travel marketplace caused by the deregulation of the air travel industry.[16] The theory behind the program is that awarding

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[12]*See* I.R.C. § 1 (Supp. III 1985). This section contains the tax rate schedules used to compute federal income tax for individuals. Because the maximum possible tax rate was 50% in 1985, the maximum tax on $100 million of bonuses would have been $50 million, assuming all taxpayers were subject to the maximum tax rate.

[13]*Game*, *supra* note 3, at 93.

[14]AT&T Communications, Inc., AT&T Opportunity Calling (1986).

[15]26 U.S.C., the Internal Revenue Code, was most recently amended on October 2, 1986 by the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085.

[16]*See, e.g.*, *Richer Rewards*, *supra* note 1, at 89; Sherman, *supra* note 1, at 106; *Sky's the Limit*, *supra* note 1, at 152. Airline fares were deregulated by the Airline Deregulation Act of 1978, which required that deregulation be completed by December 3, 1981. Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified in scattered sections of 49 U.S.C.).

free flights and other bonuses to repeat customers will create brand loyalty, thereby increasing business for the company.[17] Over time, because of increased competition and new, cut-rate airlines, the programs were not terminated as originally planned.[18] Instead, the programs were continued and expanded to allow travelers to include mileage flown on affiliated airlines as credit toward a single award.[19] By 1986, six major airlines were competing for the bulk of the frequent flyer business,[20] with other airlines instituting programs in self-defense.[21]

Although this Note will assume that the bonus received is a free flight, many other types of bonuses are available. For example, the six principal frequent flyer plans[22] offer an upgrade to first class at 10,000 miles.[23] Therefore, after the traveler has flown 10,000 miles, a program participant will pay coach fare but will obtain a first class seat. Other benefits include reduced rates for rental cars and hotel lodging.[24] In addition, bonus miles are awarded for patronizing affiliated hotel chains and car rental agencies.[25] For instance, a Delta program participant earns 1,000 extra miles each time he rents a National Rent-A-Car or stays overnight at a Marriott,[26] while United Airlines awards a 1,000 mile credit for each night spent on board a Holland America cruise ship.[27] Finally, Midway Airlines, in addition to offering a seven-day, six-night trip for two in the Virgin Islands, offers one of the more unique bonuses—$2,000 in cash.[28]

Procedurally, all frequent flyer bonus programs operate in a similar manner. American Airlines is noted for accuracy in record-keeping be-

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[17]*Richer Rewards*, *supra* note 1, at 89.

[18]*Game*, *supra* note 3, at 93.

[19]*Id.*

[20]*See New Deals*, *supra* note 5, at 170-72. The six competing airlines are American, Delta, Eastern, Pan Am, TWA and United. *Id.*

[21]*See Frequent-Flier Game*, *supra* note 8, at 79. For example, Continental and Northwest Airlines had to continue their frequent flyer programs because of business lost when the programs were discontinued. Also, Braniff instigated the first promotion that allowed credit for miles flown on competitor's airlines because of a belief that the major impediment to their success in attracting passengers was American's AAdvantage Program. *Id.*

[22]The six major frequent flyer programs are American, Delta, Eastern, Pan Am, TWA and United. *New Deals*, *supra* note 5, at 170-72.

[23]*Id.* at 170.

[24]*Richer Rewards*, *supra* note 1, at 89.

[25]*New Deals*, *supra* note 5, at 161. Some strategies can be used to increase the available bonus mile points. For example, frequent flyers will turn in a rental automobile and rent a different one daily or check into a different hotel daily because each automobile rental and hotel room rental earns bonus miles. *Id.* at 165.

[26]*Id.* at 161.

[27]UNITED AIRLINES, INC., MILEAGE PLUS PROGRAM GUIDE 26 (1987).

[28]MIDWAY AIRLINES, INC., FLYERS FIRST PROGRAM (1986).

cause of its computerized mileage log.[29] United Airlines issues a Mileage Plus card that is used like a credit card to ensure that the traveler is credited with the accrued mileage.[30] Trans World Airlines' sticker system requires that the traveler attach a sticker to the ticket stub and redeem the stub for mileage credit.[31] Midway does not compute the traveler's accrued mileage; instead, each round trip is one credit, and a bonus is awarded on the basis of round trips flown.[32]

These programs are subject to some limitations. Pan American offers the most varied program because of the availability of scheduled flights to exotic destinations; however, its program costs twenty-five dollars to join.[33] American's AAdvantage Program offers a variety of prizes but limits the availability of free travel to certain locations, particularly during the Christmas holidays.[34] Midway's literature states that rewards are subject to change without notice.[35] United's cruise awards are subject to availability and may not be booked until ninety days prior to departure.[36] Despite these restrictions, airlines attribute sudden business increases of twenty to thirty percent to the programs,[37] which indicates a strong consumer demand for continuation of frequent flyer bonus programs.

In addition to the economic inducement of *free* flights, another reason for the increasing popularity of the bonuses is their marketability.[38] For those travelers who would prefer cash to a free trip,[39] forty-four independent ticket brokers buy and resell the free travel coupons issued by the airlines to a frequent flyer bonus winner.[40] A $1,900 New York-

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[29]*See New Deals*, *supra* note 5, at 170-72.

[30]UNITED AIRLINES, INC., MILEAGE PLUS PROGRAM GUIDE 3 (1987).

[31]TRANS WORLD AIRLINES, INC., FREQUENT FLIGHT BONUS MEMBERSHIP MATERIAL (1985).

[32]MIDWAY AIRLINES, INC., FLYERS FIRST PROGRAM (1986).

[33]*New Deals*, *supra* note 5, at 170.

[34]AMERICAN AIRLINES, INC., AADVANTAGE PROGRAM, (1987).

[35]MIDWAY AIRLINES, INC., FLYERS FIRST PROGRAM (1986).

[36]UNITED AIRLINES, INC., MILEAGE PLUS PROGRAM GUIDE 26 (1987).

[37]*Frequent-Flier Game*, *supra* note 8, at 74. *But see* Dahl, *Frequently Frustrated: Travelers Find Frequent-Flier Plans Less Rewarding*, Wall St. J., July 15, 1987, at 29, col. 3. Recent restrictions imposed on awards by the airlines, including blackout days and limiting available number of sets per flight for award winners, may make the awards less valuable. *Id.*

[38]*See, e.g.*, Toy, *A Storm Warning for Frequent Fliers*, BUS. WK., Nov. 10, 1986, at 88 [hereinafter Toy]; McGrath, *The Frequent Flier Coupon Market*, U.S. NEWS AND WORLD REPORT, May 19, 1986, at 73 [hereinafter McGrath]; *Frequent Flyer Programs: Who Should Reap Benefits?* DUN'S BUS. MONTH, Apr. 1986, at 77 [hereinafter *Who?*]; *Richer Rewards*, *supra* note 1, at 92; Sherman, *supra* note 1, at 106.

[39]McGrath, *supra* note 38, at 73; Sherman, *supra* note 1, at 106. A travel agent states, "Many of our customers tell us the last thing they want is more flying." *Id.*

[40]Toy, *supra* note 38, at 88.

Honolulu round-trip can be sold for $600 to a broker, who resells it for $900.[41] Alternatively, the coupons can be bartered in private transactions.[42] One frequent flyer traded his free trip to Hawaii to his dentist in exchange for bridgework.[43] Some airlines are attempting to restrict transferability,[44] but the coupon market, which has grown into a fifty million dollar a year industry,[45] is resisting the airline's attempts.[46] Despite the uncertain future of the coupon market and the limitations the airlines impose on their programs, the demand for the bonuses suggests that frequent flyer programs are here to stay.

III. Bonus Flights in General—Income or Not?

Before considering the income treatment of frequent flyer bonuses in the context of the employment relationship, it is necessary to determine if the private individual who purchases and uses airline tickets, and thus earns a free flight, realizes income upon receipt of the free flight. There are two possible income treatments applicable to the receipt of a bonus flight. First, receipt of the free flight could trigger the recognition of income to the recipient.[47] Second, the flight could be considered a discount, in which case the receipt of the flight does not force the recognition of income but is a reduction of the cost of the underlying flights that earned the bonus.[48]

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[41]*Richer Rewards*, *supra* note 1, at 92. However, prices on the coupon market vary with the season and with supply and demand. *Id.*

[42]Sherman, *supra* note 1, at 106.

[43]*Id.*

[44]For example, Delta Airlines requires that a traveler appear personally at the ticket office in order to get a ticket transferred. *Who?*, *supra* note 38, at 74. Both United and TWA allow transfers only within families. Toy, *supra* note 38, at 88.

[45]Toy, *supra* note 38, at 88.

[46]Details of pending lawsuits concerning program participants' rights to sell their awards are beyond the scope of this Note. Generally, American Airlines and TWA have brought lawsuits to enjoin the largest coupon broker, The Coupon Bank, from selling bonus coupons. Brown, *American Airlines Files Suit Against Coupon Bank*, Travel Weekly, June 16, 1986, at 3. American Airlines was successful in obtaining a temporary restraining order against one of Coupon Bank's affiliated travel agencies; however, it expired October 14, 1986. Godwin, *Coupon Bank to File Counterclaims*, Travel Weekly, October 16, 1986, at 8 [hereinafter Godwin]. Coupon brokers have filed counterclaims alleging anti-trust violations, which one California observer believes the brokers have a 50-50 chance of winning. Toy, *supra* note 38, at 88. Also, three class actions against carriers arguing for program participants' rights to sell the coupons have been filed. Godwin, *supra* at 2.

In a recent Wall Street Journal article discussing the mounting liability of the airlines resulting from unused awards, it was noted that one lawsuit brought by American Airlines, TWA and United Airlines against a California broker was settled. Brown, *New Airline Figures Show Unused Awards Mounting*, Wall St. J., July 15, 1987, at 29, col. 5. Without additional details, it is not possible to assess the effects of this settlement on marketability.

[47]*See infra* text accompanying notes 49-61.

[48]*See infra* text accompanying notes 62-91.

A. The Bonus Flight as Income

The Code defines gross income as "all income from whatever source derived."[49] The Treasury regulations (regulations) further clarify this definition of gross income as follows: "Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, *or other property*, as well as cash."[50] On its face, therefore, the expansive statutory definition of gross income indicates that frequent flyer bonuses, whether taken in the form of flights, cash or other services, may constitute gross income to the recipient.

The contention that frequent flyer benefits constitute gross income to the recipient is bolstered by the United States Supreme Court's construction of gross income. First, the Court often construes gross income broadly by beginning its gross income determinations with the statements that Congress intended "to use the full measure of its taxing power" when it created the income tax.[51] Then, after using this broad phraseology, the Court holds that the taxpayer's argument for distinguishing the income item at issue as nontaxable is not relevant because the income item falls within the scope of Congress' broad taxing power which the Court cannot overrule.[52] For example, in *Commissioner v. Glenshaw Glass Co.*, the respondent attempted to characterize punitive damages as non-taxable because the damages were created by the "culpable conduct of third parties."[53] However, the Court refused to consider the source of the damages as a reason to distinguish them from other income items or as relevant to the issue of their taxability because

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[49]I.R.C. § 61(a) (Law. Co-op. 1986). All Internal Revenue Code citations which cite "Law. Co-op 1986" as the source are referencing U.S.C.S. TITLE 26 INTERNAL REVENUE CODE OF 1986 PAMPHLET (reflecting the Code as amended through Dec. 31, 1986).

[50]Treas. Reg. § 1.61-1(a) (1957) (emphasis added).

[51]Commissioner v. Kowalski, 434 U.S. 77 (1977) (state trooper's meal allowances taxed). *E.g.*, HCSC-Laundry v. United States, 450 U.S. 1 (1981) (cooperative hospital laundry taxed); Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955) (punitive and treble damages taxed); Helvering v. Clifford, 309 U.S. 331 (1940) (trust taxed to grantor); Helvering v. Midland Mut. Life Ins. Co., 300 U.S. 216 (1937) (interest bid by mortgagor at successful foreclosure taxed); Douglas v. Willcuts, 296 U.S. 1 (1935) (alimony taxable to payor); Irwin v. Gavit, 268 U.S. 161 (1925) (stock transfer held taxable).

[52]*See HCSC-Laundry*, 450 U.S. at 8; *Kowalski*, 434 U.S. at 83; *Glenshaw Glass Co.*, 348 U.S. at 432-33; *Clifford*, 309 U.S. at 337-38; *Midland Mut. Life Ins. Co.*, 300 U.S. at 223; *Douglas*, 296 U.S. at 9; *Irwin*, 368 U.S. at 166.

[53]*Glenshaw Glass Co.*, 348 U.S. at 429. Two cases, *Glenshaw Glass Co.*, 18 T.C. 860 (1952), and *Commissioner v. William Goldman Theatres, Inc.*, 19 T.C. 637 (1953) were consolidated and heard *en banc* by the Third Circuit Court of Appeals (211 F.2d 928 (1954)) which ruled that exemplary damages for fraud and treble damages for injury to business through violation of anti-trust laws were non-taxable because the payments were outside of the scope of the gross income section of the Internal Revenue Code of 1954. 348 U.S. at 427-29. The Supreme Court reversed. *Id.* at 428.

Congress intended to retain its broad taxing powers.[54] The Court stated, "[C]ongress applied no limitations as to the source of taxable receipts, nor restricting labels as to their nature."[55] By the same reasoning, the source of a frequent flyer bonus as a promotional mechanism has no bearing on whether the flight should be considered to be income if its receipt falls within Congress' broad taxing powers.

Second, the Court construed gross income broadly in *Glenshaw Glass Co.* when it defined punitive damages as income because they were "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."[56] Similarly, the Court has defined meal allowances[57] and embezzled funds[58] as such "accessions." By analogy, bonus flights could be considered accessions to wealth that are totally under the control of the frequent flyer, and thus are taxable as gross income to the recipient.

Third, the Court has broadly construed the definition of gross income by stating that it is Congress' intent to tax gains unless specifically exempted.[59] As the Court has explained, "[u]nder our system of federal income taxation . . . every element of gross income of a person, corporate or individual, is subject to tax unless there is a statute or some rule of law that exempts that person or element."[60] Therefore, courts strictly construe any Code section which circumvents taxation in order to enforce Congress' broad taxing powers.[61]

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[54]348 U.S. at 430.

[55]*Id.* at 429-30.

[56]*Id.* at 431.

[57]Commissioner v. Kowalski, 434 U.S. 77, 83 (1977). The Tax Court held that the meal allowances were gross income under I.R.C. § 61 (1982) and were not excludible under I.R.C. § 119(a)(1) (1982), which exempts meals for the convenience of the employer from taxation. *Id.* at 81. The Third Circuit Court of Appeals reversed. *Id.* at 81-82. Because of a conflict between the circuits, the Supreme Court granted certiorari. *Id.* at 82. The Supreme Court reversed the Third Circuit. *Id.* at 97.

[58]James v. United States, 366 U.S. 213 (1961); Rutkin v. United States, 343 U.S. 130 (1951). The *Rutkin* Court further defined control over a receipt as when, "as a practical matter, [the recipient] derives readily realizable economic value from it." *Id.* at 137.

[59]Commissioner. v. Glenshaw Glass, 348 U.S. 426, 430 (1955).

[60]HCSC-Laundry v. United States, 450 U.S. 1, 5 (1981). The Court refused to exempt a cooperative hospital laundry from taxation as an exempt organization because I.R.C. § 501(e) (1982) did not specify laundry and linen services in its listing of activities that an exempt hospital could perform. 450 U.S. at 5-6. Thus, the court narrowly construed an exemption allowed by the Internal Revenue Code.

[61]*See* Bingler v. Johnson, 394 U.S. 741 (1969) (tuition payments made in exchange for promise of future services not exempt as scholarships); Commissioner. v. Jacobson, 336 U.S. 28 (1949) (corporation's buy-back of its own indebtedness results in a taxable gain); Helvering v. American Dental Co., 318 U.S. 322 (1943) (cancellation of debt not exempted as gift); Helvering v. Northwest Steel Rolling Mills, Inc., 311 U.S. 46 (1940) (statutory exemption allowing corporations credit against income for "undistributed profits surtax" not allowed).

Thus, frequent flyer bonus flights could be considered as income because they are income "from any source" that is in the form of property or services. If the bonuses fall within the ambit of Congress' broad taxing power or are an accession to the wealth of the party receiving them, they will be taxable even to the person who paid for the original tickets unless they fall within an exemption created by statute or rule of law.

B. The Bonus Flight as Reduction of Cost

In order to perceive the frequent flyer bonus as a discount or a reduction of cost, some knowledge of accounting principles is required. Basis is the accounting concept by which a dollar value is assigned to an asset.[62] All property must have a basis so that the owner of the property is able to compute taxable gain or loss upon sale of the property[63] and to compute expenses such as depreciation.[64] As defined by the Code, one of the possible bases of property is its cost.[65] A discount reduces cost; therefore, a discount cannot be income to the recipient because it simply reduces the basis of an asset.[66]

The purchaser will record the purchase of an asset at the discount price. Then the asset is expensed or depreciated on the basis of this discounted cost. This reduction of expenses results in an increase in the

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[62]*See* I.R.C. §§ 1012-15 (Law. Co-op. 1986). These four sections define the four bases used in the Internal Revenue Code—cost, inventory, death and gift. A discussion of the last three is beyond the scope of this Note.

[63]I.R.C. § 1011(a) (Law. Co-op. 1986) states: "The adjusted basis for determining gain or loss from the sale or disposition of property, whenever acquired, shall be the basis (determined under section 1012 [cost basis] or other applicable sections . . .) . . . ." Therefore, the basis for calculating gain or loss under section 1011 begins with one of the basis sections. *See supra* note 44.

[64]I.R.C. § 167 (Law. Co-op. 1986). Section 167(g) states: "The basis on which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 1011 for the purpose of determining gain on the sale or other disposition of such property."

[65]*See* I.R.C. § 1012 (Law. Co-op. 1986) (basis of property shall be the cost of such property). *Cf.* I.R.C. §§ 1013-15 (detail of the inventory, death and gift bases which are for use when cost is unavailable or not applicable). *See generally* W. MEIGS, & R. MEIGS, FINANCIAL ACCOUNTING 15 (5th ed. 1983); D. KIESO & J. WEYGANDT, INTERMEDIATE ACCOUNTING, 5 (5th ed. 1986) [hereinafter KIESO] (One of the four basic principles of accounting is the historical cost principle that requires that assets and liabilities be accounted for and reported on a basis of acquisition price because it has the advantage of being "definite and verifiable").

[66]*See* KIESO, *supra* note 65, at 330. Purchase discounts have been treated either as income or as a reduction of the inventory purchases account. However, comparison of methods shows that "the arguments for a reduction of purchases are stronger than those usually presented in support of financial revenue" because a business does not realize income upon purchase of goods, but upon their later sale. *Id.*

purchaser's income related to such expensed or depreciable assets. If the asset is later sold, the gain or loss on the sale is computed on the basis of the discounted cost. The purchaser recognizes more income because of the initial lower, or discounted, basis.[67] As applied to airline bonus flights, the recipient of a frequent flyer bonus will not recognize income if the bonus flight is considered to be a discount; instead, the recipient has a lower basis in the underlying flights upon which the bonus was earned.

As will be shown, a discount can be economically defined as the reduction of an asset's price to its fair market value.[68] In the economic terms of supply and demand, if the retail price of an item is overstated, demand for the item is reduced because of the excessive price and the item will not sell unless the price decreases.[69] Therefore, the discount is a mechanism that a seller can use to reduce the item's price to true fair market value in the competitive marketplace.[70]

After airline deregulation in 1981, frequent flyer benefits came into being as one response by airlines to increased competition and cut-rate airfares in the changing marketplace.[71] According to senior airline sales personnel, the bonus programs were "initiated defensively" and are viewed as "a necessity" to effective competition.[72] For instance, both Continental and Northwest lost so much business after they discontinued their discount programs that they were forced to reinstate them.[73] Thus, frequent flyer bonus programs are, in effect, discounts that are being used by the airlines as a mechanism to match the price of a commodity, public air transportation, with the demand for that commodity.

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[67]*Cf.* I.R.C. § 167 (Law. Co-op. 1986) *supra* note 64; I.R.C. § 62 (Law. Co-op. 1986). If the depreciation deduction as computed under section 167 is smaller because it is computed on a lower cost item, then adjusted gross income as computed under section 62 will be larger because the deductible trade and business expenses under section 62(1) will be smaller.

[68]*See infra* text accompanying notes 69-73.

[69]*See generally* R. LIPSEY, P. STEINER & P. PURVIS, ECONOMICS 58-74 (8th ed. 1987) [hereinafter LIPSEY]. One factor that affects demand is the price of the item. As there is excess supply of a commodity in the marketplace, demand will decrease and suppliers will be forced to lower their prices in order to sell excess commodities. When supply equals demand, prices will remain constant at equilibrium price. *Id.*

[70]*See id.*

[71]*See supra* text accompanying notes 16-21. "[Equilibrium price] will persist once established, unless it is disturbed by some change in market conditions." LIPSEY at 70. Increased competition caused by deregulation of air carriers is a change in the market condition because regulation was a governmental restriction holding price above the equilibrium. When such a "price floor" is removed, the retail price will drop to reach the free-market equilibrium level. *See id.* at 99-100.

[72]*Frequent-Flier Game*, *supra* note 8, at 75.

[73]*Id.*

Tax commentators have characterized frequent flyer bonuses as non-taxable volume discounts.[74] A volume discount is a discount offered to encourage purchase of larger quantities because it rewards the purchaser by reducing cost of purchases as more of an item is purchased.[75] For example, if the purchaser buys one apple, the price is forty cents; if he buys three, the price is one dollar.[76] One tax commentator states "Frequent flyer programs are basically just complicated discounts for the purchase of multiple airline tickets. Discount purchases generally do not have income tax consequences."[77] That author also asserts that the only difference between a regular volume discount and a frequent flyer award is that the frequent flyer programs allow the purchasers to spread their expenditures for individual airline tickets over time instead of having to buy them all at once, as would be required by a "regular" volume discount.[78] Another author states that, "[f]requent flyer programs are elaborate volume discount mechanisms, whereby participants obtain air transportation at a reduced price. Since no deductions are taken with respect to personal travel, where an award is received on account of such travel, its utilization should not give rise to taxable income."[79] This reasoning indicates that the free flight is not income, but rather is a volume discount because it is a reduction in the cost of all previously purchased tickets.

While frequent flyer bonuses are a relatively new phenomenon, their taxability may be determined by reference to analogous concepts.[80] The

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[74]*E.g.*, Aidinoff, *Frequent Flyer Bonuses: A Tax Compliance Dilemma*, 31 TAX NOTES 1345 [hereinafter Aidinoff]; Forman, *Income Tax Consequences of Frequent Flyer Programs*, 26 TAX NOTES 742 [hereinafter Forman].

[75]J. SMITH & K. SKOUSEN, INTERMEDIATE ACCOUNTING 248 (8th ed. 1984).

[76]*Id.* In a volume discount situation, each rate is applied to the balance after subtracting the result of applying the prior discount rates, as follows:

	Discount	*New Invoice Amount*
$5,000 X 20%	$1,000	$5,000 – $1,000 = $4,000
$4,000 X 10%	$ 400	$4,000 – $ 400 = $3,600
$3,600 X 5%	$ 180	$3,600 – $ 180 = $3,420

Thus the buyer only remits $3,420.

[77]Forman, *supra* note 74, at 742.

[78]*Id.*

[79]Aidinoff, *supra* note 74, at 1347.

[80]One somewhat analogous idea, the windfall, is a taxable event. In Commissioner v. Glenshaw Glass, 348 U.S. 426 (1955), the respondent attempted to claim that punitive damages were not within the scope of the gross income section because they were a windfall. *Id.* at 429-30. This approach was not accepted by the court. *Id.* at 430. The fair market value of another windfall, finding buried treasure, should be computed in United States dollars and included in the gross income of the finder. Rev. Rul. 53-61, 1953-1 C.B. Also, finding money is a taxable windfall. In Cesarini v. United States, 428 F.2d 812 (6th Cir. 1970), an amount of money found in an old piano belonging to petitioner was includible in petitioner's gross income in the year it was found. *Id.* at 814.

concept of a bargain purchase, which is a non-taxable event akin to a discount, supports the treatment of frequent flyer bonuses as discounts.[81] In a bargain purchase situation, the purchase price of an asset is less than its fair market value.[82] By comparison, a discount reduces the purchase price of an asset to its fair market value in order to promote its sale.[83] For tax purposes, the bargain purchaser recognizes no income at the time of the purchase.[84] Instead, the low bargain purchase cost is assigned as the basis of the property.[85] Similarly, a frequent flyer bonus flight recipient should recognize no income because the award is a volume discount that reduces the traveler's cost in the underlying tickets.[86]

In addition to the bargain purchase concept, the Internal Revenue Service's treatment of rebates[87] supports the assertion that frequent flyer bonuses are merely a reduction of cost, not gross income. According to the IRS, a purchaser does not recognize gross income upon receipt of a cash rebate.[88] Instead, the rebate reduces the basis of the purchased asset.[89] Even the cash refund received by a new car buyer from an automobile manufacturer is not considered to be income because the actual purchase price of the automobile is reduced by the amount of the rebate, thus giving the automobile a lower basis in the hands of the buyer.[90] The receipt of a rebate is similar to the receipt of a bonus flight because, in each case, the seller returns a valuable interest to the buyer after a purchase has been made.[91] Therefore, a frequent flyer

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However, the windfall analysis is weakened in the case of bonus flights because the taxpayer has given something for the underlying flights upon which the bonus is based. Therefore, the receipt of a frequent flyer bonus does not appear to be a taxable event similar to a windfall.

[81]*E.g.*, Commissioner v. Lo Bue, 351 U.S. 243 (1956); Palmer v. Commissioner, 302 U.S. 63 (1937).

[82]*Palmer*, 302 U.S. at 69.

[83]*See supra* text accompanying notes 68-79.

[84]*Lo Bue*, 351 U.S. at 248. Stating that no current income recognition is required in an arm-length bargain purchase transaction, the Court held the transfer of stock options to Lo Bue to be taxable because the employment relationship is not at arm's length. *Id.*

[85]*Id.*

[86]*See supra* text accompanying notes 74-79.

[87]Rev. Rul. 76-96, 1976-1 C.B. 23.

[88]*Id.*

[89]*See supra* notes 62-67 and accompanying text.

[90]Rev. Rul. 76-96, 1976-1 C.B. 23 states: "[R]etail customers who . . . receive the rebates . . . are not in receipt of gross income. However, under section 1016 of the Code, a downward adjustment to the basis of the new purchased automobile is required." *See also* I.R.C. § 1016(a)(1) (Law. Co-op. 1986). "Proper adjustment in respect of the property shall in cases be made—(1)for expenditures, *receipts*, losses or other items properly chargeable to the capital account . . . ." (emphasis added). *Id.*

[91]*See* Rev. Rul. 76-79, 1976-1 C.B. 23; *see also supra* text accompanying notes 38-46.

bonus is comparable to a rebate and should receive the same non-taxable treatment.

In conclusion, when the person who uses the bonus flight is the same person who paid for the underlying tickets, there should be no recognition of income by the recipient. Although the concept of gross income as promulgated by Congress and supported by case law is extremely broad,[92] analysis of discounts[93] and examination of the many similarities between frequent flyer benefits and other concepts that have no tax consequences, such as the rebate[94] and the bargain purchase,[95] indicate that bonuses should also be non-taxable. Therefore, frequent flyer bonuses are a type of volume discount that is non-taxable as long as the person who uses the bonus flight is the same person who paid for the underlying tickets.

IV. The Addition of the Employment Relationship to the Frequent Flyer Situation

The issue of income recognition of frequent flyer bonuses is most likely to arise in the context of the employment relationship because the majority of the frequent flyer bonuses are earned by business travelers.[96] In fact, more than ninety percent of frequent flyers are business travelers, and twenty percent of all airline passengers supply seventy percent of several major airlines' traffic.[97] Therefore, the target market of frequent flyer programs is the businessman[98] who flies at least 12,000 miles a year.[99]

Furthermore, the airlines concede that the programs were structured to benefit individuals, not their corporate employers, because the strategy of bonus programs is brand loyalty among individual travelers.[100] One airline vice president has said, "'Obviously, we wanted the traveler to get the award . . . . If companies forced people to turn in their prizes, we'd try to curtail the program.'"[101] Thus, the bonus flight is most likely to be earned in the context of the employment relationship.

The conclusion that a frequent flyer bonus is not gross income[102] does not necessarily follow when a third party, the employer, pays for

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[92]*See supra* text accompanying notes 49-61.
[93]*See supra* text accompanying notes 62-79.
[94]*See supra* text accompanying notes 87-91.
[95]*See supra* text accompanying notes 80-86.
[96]*Sky's the Limit*, *supra* note 1, at 89.
[97]*Id.*
[98]*Richer Rewards*, *supra* note 1, at 89.
[99]Sherman, *supra* note 1, at 106.
[100]*Id.* (quoting Brian J. Kennedy, TWA vice president for advertising and sales).
[101]*Id.*
[102]*See supra* text accompanying notes 47-94.

the employee's tickets and then allows the employee to retain the bonus flight. Generally, if the person who paid for the underlying tickets gives the free flight earned on those tickets to a third party, the third party will not recognize income because of the Code provision which exempts gifts from inclusion in gross income.[103] For instance, if a frequent flyer gives a bonus flight to a friend, it will be a gift unless the donor receives something in return. On the other hand, if the recipient of the bonus sells it to a third party, there is no question but that the seller has realized gain or loss that qualifies as taxable income or loss.[104] However, when an employer pays for an employee's business related travel as an "ordinary and necessary business expense,"[105] then allows the employee to retain the bonus flight for personal use, it must be determined whether the employee has received taxable income.[106]

A. The Award's Receipt—Who is the Recipient?

Once the employment relationship is added to the frequent flyer bonus scenario, the preliminary issue for resolution is the identity of the award recipient. The airlines technically issue the free ticket to the individual passenger, and not to the employer,[107] for at least two reasons. First, if the individual has purchased the underlying tickets and was subsequently reimbursed by the employer, the airline has no knowledge of the employment relationship.[108] In fact, the airlines refuse to police allocation of the bonuses because they view the issue as "an employer/employee relationship problem."[109] Second, in line with the airlines' policy of targeting the traveling businessman market,[110] most airlines restrict membership to individuals.[111]

Because frequent flyer bonus flights are awarded by the airline directly to the traveler[112] it appears that the employee received income from the airline, a third party, and not from the employer. However, because

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[103]*See infra* text accompanying notes 149-64.

[104]*See* I.R.C. § 1011 (Law. Co-op. 1986). Because the frequent flyer bonus recipient who paid for the underlying flights is considered to have received a volume discount that reduces his basis in the underlying flights, his basis for figuring gain or loss upon the sale of the bonus flight is the amount allocated as discount to the underlying flights. *See id.*; *see also supra* notes 63-64 and accompanying text.

[105]*See* I.R.C. § 162 (Law. Co-op. 1986); *see also infra* note 122.

[106]*See supra* text accompanying notes 56-58.

[107]Sherman, *supra* note 1, at 106.

[108]Many employees enrolled in frequent flyer bonus programs have their mileage statements sent directly to their homes. *Id.*

[109]*Who?*, *supra* note 38, at 74.

[110]*Richer Rewards*, *supra* note 1, at 89.

[111]Sherman, *supra* note 1, at 106; Dubin, *Guess Who Wants Your Frequent Flier Coupons*, Bus. Wk., Aug. 5, 1985, at 37.

[112]Sherman, *supra* note 1, at 106.

the employer has paid for the underlying tickets as ordinary and necessary expenses of doing business,[113] it will be shown that the employer has the right to the income realized or the discount created by the receipt of the bonus flight.

In *Fritschile v. Commissioner*,[114] the United States Tax Court has held that the person in a position analogous to the employer's is the one who earned income.[115] In that case, the petitioner contracted to make award ribbons such as those awarded for winning athletic events.[116] Her children made most of the ribbons and the taxpayer allocated seventy percent of the income to them; therefore, her tax return reflected only thirty percent of the income from the ribbon-making enterprise.[117] The court held that the income was allocable to the parent because the parent contracted to do the work, was responsible for the work, and had the right to the proceeds of the work.[118] In so holding, the court followed the "fruit and tree doctrine" of *Lucas v. Earl*,[119] which requires that income must be taxed to the individual by whom it is earned. However, the *Fritschile* court extended that doctrine and stated: "Recognizing that the true earner cannot always be identified simply by pointing 'to the one actually turning the spade or dribbling the ball,' this Court has applied a more refined test—that of who controls the earning of the income."[120] Because Mrs. Fritschile "managed, supervised, and otherwise exercised total control over the entire [ribbon-making] operation," the Tax Court attributed all the ribbon-making income to her.[121]

By comparison, the earning of a frequent flyer bonus is under the total control of the taxpayer who is paying for the tickets upon which the bonus is earned. If an employer decides not to pay for the underlying tickets, the employee cannot earn the bonus flight. The employer allocates plane tickets to frequently traveling employees in the same way that

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[113]I.R.C. § 162 (Law. Co-op. 1986), *infra* note 122.

[114]Fritschile v. Commissioner, 79 T.C. 152 (1982).

[115]*Id.* at 158-59.

[116]*Id.* at 154.

[117]*Id.*

[118]*Id.* at 155-56.

[119]281 U.S. 111 (1930). In 1901, Lucas and his wife contracted that all of their assets, present and future, were to be held as joint tenants with rights of survivorship. *Id.* at 113-14. Because of this contract, Lucas and his wife each claimed half of Lucas' salary for tax purposes. *Id.* at 114. The Court held that Lucas should be taxed on the total salary because, despite the contract, "fruits" could not be separated from the "tree" on which they grew. *Id.* at 115.

[120]*Fritschile*, 79 T.C. at 155 (quoting Johnson v. Commissioner, 78 T.C. 882, 890 (1982) *aff'd without op.*, 734 F.2d 20 (9th Cir.), *cert. denied*, 469 U.S. 857 (1984)). The *Johnson* court held that a personal service corporation created by a professional basketball player was not the true earner of basketball related income and would not be taxed on the income. Instead, the player would be taxed. 78 T.C. at 893-94.

[121]*Fritschile*, 79 T.C. at 156.

Mrs. Fritschile allocated work and ribbon-making materials to her children. Without her allocation, the children could not earn money by making ribbons; similarly, without the employer's allocation of plane fare, the salesmen could not earn enough time in flight to be awarded the bonus trip. It follows, then, that even the employer who is unaware that a bonus flight has been awarded to an employee is the "true earner" of the flight because he paid for the underlying tickets. Therefore, if the employee receives, retains and uses a frequent flyer bonus for a personal purpose, it was received from the employer, not from the airline.

B. Taxability of Employer Awarded Bonus Flights

Once it has been determined that the free flight was, however briefly or constructively, the property of the employer, the thrust of the income recognition analysis must center on the actual or implied transfer of the bonus from the employer to the employee.[122] If the traveling employee appears to have received an accession of wealth that qualifies as "all income from whatever source derived,"[123] the employee must include the flight in gross income and it will be subject to taxation unless a statute or rule of law exempts it.[124] The following analysis and precedents specifically refer to and define taxability of various employer payments to the employee.

The Supreme Court has stated that the definition of gross income, "is broad enough to include in taxable income any economic or financial benefit conferred on an employee as compensation, whatever the form or mode by which it is effected."[125] In the frequent flyer situation,

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[122]Although a transfer, whether actual or implied, also occurs when the bonus, however briefly, is owned by the employer, analysis of the employer's income recognition should result in the conclusion that the employer has received a volume discount, not income. *See supra* text accompanying notes 62-95. Furthermore, even if the opposite conclusion that the employer has received income is reached, there will be no tax effect on the employer because if income must be recognized, an equal offsetting deduction for an ordinary and necessary business expense will accrue when the employee receives the free flight. *See* I.R.C. § 162(a) (Law. Co-op. 1986). "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—(1) a reasonable allowance for salaries or other compensation for personal services actually rendered . . . ." *Id.* The employer will be entitled to the deduction regardless of whether the trip is considered to be sales expense when used as another business trip or as salary or bonus if it is given to the employee to use as he wishes. *See* I.R.C. § 162(a)(1) (Law. Co-op. 1986). Thus, there is no net taxable effect to an employer who allows the bonus flight to be used by an employee for any purpose. *See* I.R.C. § 62(a)(1) (Law. Co-op. 1986).

[123]I.R.C. § 61 (Law. Co-op. 1986); *see also supra* text accompanying notes 56-58.

[124]*See supra* text accompanying notes 59-61.

[125]Commissioner v. Smith, 324 U.S. 177, 181 (1945).

because the employer is considered to have a right to retain the bonus, an economic benefit is conferred by the employer when the employer allows the employee to retain the bonus for personal use.[126] Therefore, gross income, by definition, is broad enough to include a frequent flyer bonus flight as compensation for the employee.

This reasoning is supported by the Supreme Court's analysis in *Commissioner v. Lo Bue*.[127] In that case, the Court held that a distribution of stock options to employees could not be considered a gift because the lack of "detached and disinterested generosity."[128] Reasoning that the employer must have distributed the stock options to the employees to "secure better services,"[129] the court characterized the distribution as compensation.[130] In *Lo Bue*, the Court declined to recognize the existence of any gratuitous motives in the employment relationship.[131]

Similarly, an employer who allows an employee to retain a frequent flyer bonus should not be imputed with gratuitous motives. For instance, the employer may believe that the employment relationship might be damaged if the employee is forced to release the bonus.[132] However, if the employee is allowed to retain the bonus to maintain a satisfactory employment relationship, the employer is attempting to "secure better services" under the *Lo Bue* definition.[133] Thus, the bonus is not gratuitous, is received as compensation and should be included in the employee's gross income.

Furthermore, the employer may not intend to compensate the employee but may allow the employee to retain the bonus for other reasons.[134] For instance, the employer may allow all employees to retain frequent flyer bonuses earned because the employer believes that the cost of implementing a fair monitoring system to reclaim the bonuses is too high.[135] However, because of the Supreme Court's construction of the intent of Congress to use the full measure of its taxing power, courts will not consider as relevant the fact that the employee is only retaining the bonus because of the employer's record-keeping problems[136] and the bonus flight will be included in gross income.

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[126]*See id.*
[127]Commissioner v. Lo Bue, 351 U.S. 243 (1956).
[128]*Id.* at 246.
[129]*Id.* at 247.
[130]*Id.*
[131]*See id.* at 245-48.
[132]Sherman, *supra* note 1, at 106; *Who?*, *supra* note 38, at 74.
[133]*Lo Bue*, 351 U.S. at 247.
[134]*See Who?*, *supra* note 38, at 74.
[135]*Id.*
[136]*See supra* text accompanying notes 51-55.

Finally, the employer might choose to allow the employee to retain the bonus as additional compensation.[137] Frequent flyer bonus flights are analogous to any other taxable incentive bonus trips includible in the employee's gross income as compensation for services rendered.[138] Employer and employee are receiving equivalent benefits regardless of the source of the flight—improved performance for the employer and a free vacation for the employee.[139] Therefore, it is irrelevant whether the trip was earned through a frequent flyer program or whether the employer paid for the vacation as a bonus for services rendered; the trip should be included in the employee's gross income.

In conclusion, for income determination purposes, the employee has received a free flight from the employer, not the airline. Because of a lack of gratuitous motives by the employer, the bonus must be considered to be compensation to the employee. Thus, it must be included in the employee's gross income.

IV. Exclusion of the Frequent Flyer Bonus from Gross Income

Once it has been determined that the frequent flyer bonus constitutes gross income to the employee who is allowed to retain the flight for personal use, it must be decided whether the income is excludible under an exception to one of the income inclusionary sections of the Code[140] or under one of the income exclusionary sections of Code.[141] However, the applicability of these sections must be discussed in light of Congress' intention, as interpreted by the Supreme Court, to create broad income inclusionary powers; therefore, these exceptions should be strictly construed so that the intent of Congress to include all income will be followed.[142]

A. General Exclusionary Sections

The inclusionary Code section concerning certain nontaxable prizes and awards may provide a basis for a claim of exclusion for frequent

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[137] *Who?*, *supra* note 38, at 77. As long as it does not cost the company anything beyond the loss of the free flight, most companies do not mind letting the traveling employee retain the bonus for personal use. *Id.*

[138] *See, e.g.*, McCann v. United States, 696 F.2d 1386 (Fed. Cir. 1983) (trips that were primarily vacations furnished to employee were taxable to the employee despite some business purpose); Lynch v. Commissioner, 45 T.C.M. (CCH) 1125 (1983) (Japan seminar and vacation was includible in gross income).

[139] *See McCann*, 696 F.2d at 1389.

[140] *See* I.R.C. §§ 71-89 (Law. Co-op. 1986). These sections comprise Part II of the Code subtitled "Items specifically included in gross income."

[141] *See* I.R.C. §§ 101-35 (Law. Co-op. 1986). These sections comprise Part III of the Code subtitled "Items specifically excluded from gross income."

[142] *See supra* text accompanying notes 49-61.

flyer bonuses.[143] Code section 74 was amended by the Tax Reform Act of 1986[144] so that an award can be excluded in only two situations. First, the recipient of any award, even previously non-taxable awards such as the Pulitzer or Nobel Prize, will be taxed on the amount received unless it is donated to charity.[145] Second, the award may be excluded if it qualifies as an employee achievement award.[146] These awards, as defined in the new tax act, are exempt only if they are items of personal property given to the employee for length of service or safety achievement and which are awarded as a part of a meaningful presentation under circumstances that do not create a significant likelihood of the payment of disguised compensation.[147] The definition of employee achievement awards is too narrow to allow frequent flyer benefits to qualify because they are unlikely to be presented for length of service or safety achievement in a meaningful ceremony.[148] Therefore, an employee who receives a frequent flyer bonus will not be able to exclude it as a non-taxable prize or award.

Code section 102, an exclusionary section concerning gifts, states that gifts are not generally includible as gross income.[149] However, it must be determined whether a frequent flyer bonus given to an employee is truly a "gift" within the meaning of section 102. In *Helvering v. American Dental Co.*,[150] the Supreme Court defined the relationship between income and gifts in light of section 102 by stating: "Gifts, however, is a generic word of broad connotation, taking coloration from the context of the particular statute in which it may appear. Its plain meaning in its present setting denotes, it seems to us, the receipt of financial advantages gratuitously."[151] Therefore, if the frequent flyer

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[143]I.R.C. § 74(a) (Law. Co-op. 1986) ("Except as otherwise provided in this section . . . gross income includes amounts received as prizes and awards.").

[144]I.R.C. § 74(a) (Law. Co-op. 1986). This section prior to amendment in 1986 had provided that various recognition awards were not included in gross income if the recipient met certain tests. I.R.C. § 74(a) (1982).

[145]I.R.C. § 74(b) (Law. Co-op. 1986). Recognition awards exempt under prior law, are not exempt unless the award-winner was selected without action on his part, he is not required to render "substantial future service" as a condition of receipt, and the award is transferred to a governmental unit or a qualified charitable organization. *Id.*

[146]I.R.C. § 74(c) (Law. Co-op. 1986). This section exempts from income employee awards to the extent they are an allowable deduction under § 274(j) (Law. Co-op. 1986).

[147]I.R.C. § 274(j) (Law. Co-op. 1986). This section sets monetary limits for the awards. Therefore, even if a frequent flyer bonus could qualify as a safety or length of service award, it would not qualify if it was worth more than the upper limit for an employee achievement award.

[148]*See* I.R.C. § 74(c) (Law. Co-op. 1986).

[149]I.R.C. § 102 (Law. Co-op. 1986).

[150]318 U.S. 330 (1943).

[151]*Id.* at 330.

bonus is given gratuitously, it will be excluded from the employee's income under Code section 102.[152]

In *Commissioner v. Duberstein*,[153] the Court further defined gifts and added a standard for determining whether a transfer is gratuitous. First, the term "gift" does not have the same meaning in tax law as it does in common law;[154] therefore, the colloquial meaning of the term gift as a transfer without consideration is not controlling if other factors indicate insufficient donative intent.[155] Second, a gift must be made from detached or disinterested generosity.[156] Third, the transferor's intention is the most critical consideration in whether or not there is a gift; however, that intention should be judged by objective, not subjective, criteria.[157] Finally, wishes or agreements of taxpayers as to tax treatment are not controlling; instead, the criteria should be an objective inquiry into the substantive reason for transfer.[158] In applying these concepts to frequent flyer bonus receipts, the intent of the airline is to create brand loyalty among individual travelers in order to generate business[159] and the intent of the employer is to encourage the employee's performance.[160] Viewed objectively, neither of these reasons for awarding the bonus show sufficient donative intent to support the finding that the free flight is a gift subject to exclusion under Code section 102.[161]

Finally, a new subsection has been added to the Code section 102[162] that states in pertinent part: "[This section] shall not exclude from gross income any amount transferred by or for an employer to, or for the benefit of, an employee."[163] Thus, the new law, supported by the *American Dental* and *Duberstein* cases, provides that frequent flyer benefits

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[152]However, in Commissioner of Internal Revenue v. Lo Bue, 351 U.S. 243 (1956), the Supreme Court reasoned that there are few gratuitous transfers in the context of the employment relationship. *Id.* at 245-48; *see also supra* text accompanying notes 127-39.

[153]363 U.S. 278 (1960).

[154]*Id.* at 285.

[155]*Id.* at 286.

[156]*Id.* at 285.

[157]*Id.* at 286.

[158]*Id.*

[159]*See supra* text accompanying notes 16-21.

[160]*See supra* text accompanying notes 132-39.

[161]363 U.S. at 286. Another case, Robertson v. United States, 343 U.S. 771 (1952), further defined excludible gifts. In that case, the Court held that the winner of a prize for composing a symphony did not receive a gift because the transfer was considered to be payment for services rendered in writing the symphony; payment was simply a release of the contract created by the contest entry. *Id.* at 713. Similarly, free flights are a contract between airline and passenger to award a free flight if a certain number of miles are flown; therefore, the receipt of the flight should not be exempted from income as a gift.

[162]I.R.C. § 102(c) (Law. Co-op. 1986).

[163]*Id.*

will constitute "any amount transferred by or for an employer to, or for the benefit of, an employee,"[164] and therefore will not be excluded from gross income as a gift.

B. Fringe Benefits

A final exclusionary Code section under which an employee could attempt to exempt the income from frequent flyer bonus awards was created by the Tax Reform Act of 1984.[165] Section 132[166] lists specific fringe benefits that may be excluded from an employee's income. The general rule is that fringe benefits are taxable.[167] Before determining if frequent flyer benefits qualify under the exclusionary exception to this general rule, it must be determined whether frequent flyer bonuses are fringe benefits to the employee.

Fringe benefits must be defined by examples because they are not generically defined in the Code or accompanying regulations. In 1984, the Joint Committee on Taxation named various items as examples of employee benefits.[168] This list included employee benefits specifically exempted by the Code such as health plan benefits, cafeteria plans, and lodging for the convenience of the employer.[169] In addition, the Committee listed many fringe benefits that have been held to be includible in the employee's gross income such as personal use of a company automobile, airplane or yacht; employer provided clothing; reimbursement of lunch expenses; reimbursement of expenses for convention trips not primarily for business purposes; and reimbursement of loss on sale of a personal residence.[170] All of these items are of benefit to the employee and are given by the employer; similarly, frequent flyer bonuses are given by the employer for the benefit of the employee.[171] Thus, it appears that

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[164]*See id.*

[165]I.R.C. § 132 (Law. Co-op. 1986) (originally enacted as the Tax Reform Act, Division A, Deficit Reduction Act of 1984, Pub. L. 98-368, 98 Stat. 494-1210).

[166]*Id.*

[167]I.R.C. § 61(a) (Law. Co-op. 1986). Section 531(a) of the Tax Reform Act of 1984 specifically modified I.R.C. § 61 to identify fringe benefits as a taxable component of gross income because of taxpayers' erroneous belief in the non-taxable status of fringe benefits. *See infra* text accompanying notes 175-80. Before the Act, I.R.C. § 61(a)(1) (1982) included in gross income "compensation for services, including fees, commissions, and similar items." After the Act, I.R.C. § 61(a)(1) (Supp. III 1985) included in gross income "compensation for services, including fees, commissions, fringe benefits, and similar items."

[168]JOINT COMMITTEE ON TAXATION, 98TH CONG., 2D SESS., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984 838 (Comm. Print 1985) [hereinafter EXPLANATION].

[169]*Id.*

[170]*Id.* at 838 n.68.

[171]*See id.*

frequent flyer bonuses have the characteristics of other employee fringe benefits and should be classified as such.

Because of the breadth of the concept of gross income, all fringe benefits are taxable unless specifically excluded.[172] As yet, there is no case law to help to determine whether Congress intended frequent flyer bonuses to be a type of fringe benefit that fall within the scope of the exclusion provided by Code section 132.[173] Therefore, Congress' intent must be determined by examining Committee reports, which indicate that Congress was influenced by the history of fringe benefit taxation.[174] In 1975, the Treasury Department promulgated a discussion draft of regulations to ensure that fringe benefits would be properly included in gross income; however, no permanent regulations ensued.[175] Apparently, Congress did not agree with the intent of these regulations because, in 1978, it issued a moratorium on the issuance of fringe benefit regulations that extended until January 1, 1984.[176] Thus, despite Code section 61's all-inclusive income concept,[177] both employers and employees have believed that many fringe benefit items were non-taxable even though the benefits fell within the broad definition of gross income.[178] Also, because of this confusion as to the tax treatment of various benefits, tax law administrators have not treated taxpayers in similar situations equally.[179] In enacting the fringe benefit legislation, Congress intended to cure these inequities.[180] Furthermore, Congress intended to strike a balance between two competing objectives, the valid business purpose of the employer and the delineation of clear boundaries outside of which an employee cannot be compensated without tax consequences.[181]

First, Congress realized that businessmen often have valid business reasons other than compensation for giving employees discounts.[182] The Committee Report states, "For example, a retail clothing business will want its salespersons to wear, when they deal with customers, the clothing which it seeks to sell to the public, rather than clothing sold by its competitors."[183] Congress intended that under these types of circum-

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[172]*See supra* notes 49-61 and accompanying text.

[173]I.R.C. § 132 (Law. Co-op. 1986).

[174]EXPLANATION, *supra* note 168, at 839.

[175]*Id.*

[176]*See id.* at 839-40.

[177]*See supra* notes 49-61 and accompanying text.

[178]EXPLANATION, *supra* note 168, at 840. In many industries, there are long established practices of providing employees free, or discounted goods and services "which the employer sells to the general public." *Id.* These practices in the past "have been treated by employers, employees, and the Internal Revenue Service as not giving rise to taxable income." *Id.*

[179]*Id.* at 841.

[180]*Id.*

[181]*Id.* at 840-41.

[182]*Id.* at 840.

[183]*Id.*

stances both employers and employees might continue to act in the best interests of the business without penalty.[184] Therefore, if a frequent flyer bonus is given to an employee for a valid business purpose other than compensation, it should be excluded from the employee's gross income.[185] If, however, an employee retains a frequent flyer bonus for personal use and there is no corresponding benefit to the employer, then Congress' intent to protect the business purpose of the employer would not be served by allowing the employee to exclude the bonus from gross income.[186]

Second, by promulgating section 132 to exempt certain fringe benefits from taxation, Congress intended to define the non-taxable fringes in order to "set forth clear boundaries for the provision of tax-free benefits."[187] Congress further intended to prevent an unwanted tax increase from occurring by preventing the shifting and shrinking of the tax base[188] that might occur if some employees received considerable compensation in the form of unregulated non-cash fringe benefits.[189] Congress was concerned that the tax burden might shift and fall unevenly on employees in jobs not encouraging receipt of fringe benefits because those in jobs with fringe benefits would receive more income in a non-taxable form.[190]

To be excluded under section 132, frequent flyer benefits must qualify as one of the four excludible fringe benefits defined in the section.[191] First, an employee may exclude the value of an additional no-cost service received from his employer.[192] Generally, because airplanes usually fly at only sixty percent of capacity,[193] frequent flyer bonuses involve no additional cost to the airlines.[194] However, although the exemption seems tailor-made for airlines, this benefit applies only to the employees of

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[184]*See id.*

[185]*See id.*

[186]*See id.*

[187]*Id.*

[188]*Id.* at 841.

[189]*See id.*

[190]*Id.*

[191]I.R.C. § 132(a) (Law. Co-op. 1986) states: "Gross income shall not include any fringe benefit which qualifies as a—(1) no-additional cost service, (2) qualified employee discount, (3) working condition fringe, or (4) de minimus fringe."

[192]I.R.C. § 132(b) (Law. Co-op. 1986) states:

> [T]he term 'no-additional cost service' means any service provided by an employer to an employee for use by such employee if—(1) such service is offered for sale to customers in the ordinary course of the line of business of the employer in which the employee is performing services, and (2) the employer incurs no substantial additional cost (including forgone revenue) in providing such service to the employee . . . .

[193]*See* Sherman, *supra* note 1, at 108.

[194]*See New Deals*, *supra* note 5, at 170-72.

the *airlines*,[195] not to employees of other business; therefore, this exemption cannot apply to frequent flyer bonus flights.

Second, the exemption for qualified employee discount fringe benefits applies to employees who receive discounts on goods or services that the employer sells.[196] This exemption cannot apply to benefits received by the general frequent flyer because the recipient must be an employee of the airline to qualify under this section.[197] Furthermore, the temporary regulations have plugged a potential loophole by stating that an exclusion of income due to a qualified employee discount does not apply to reciprocal agreements between employers.[198] Even if the airline receives discounts for its employees from the employer whose employees receive bonus flights, the goods and services exchanged will not be excludible from gross income for the employees of either company. The temporary regulation imposes a final constraint on the exempt status of employee discounts when it states that quantity (volume) discounts are not reflected by this benefit unless the employee himself purchases the requisite quantity of the product or service;[199] therefore, because the employer paid for the flights, the employee must include any bonus flights received in gross income.

Third, an exemption from gross income is provided for a working condition fringe benefit. This exemption applies to property awarded to the employee which would have been deductible as a business expense,[200] or subject to capitalization and depreciation,[201] if the employee had been

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[195]*Cf.* Temp. Treas. Reg. § 1.132-2T (1985). Subsection (b) provides that reciprocal agreements between employers to provide no-additional cost service fringe benefits to each other's employees are allowed if the services meet the requirements of I.R.C. § 132(b)(1) & (2). Because this is the only way a no-additional cost service fringe benefit can be made available to non-employees of the employer providing the service, frequent flyer benefits made available to the public cannot qualify for exclusion under this section.

[196]I.R.C. § 132(c)(1) (Law. Co-op. 1986) states:

> The term 'qualified employee discount' means any employee discount [on property or services offered for sale in the employer's ordinary course of business] to the extent the discount does not exceed—(A) in the case of property, the gross profit percentage of the price at which the property is being offered by the employer to customers, or (B) in the case of services, 20 percent of the price at which services are being offered to customers.

[197]*See id.*

[198]Temp. Treas. Reg. § 1.132-3T(a)(3) (1985).

[199]Temp. Treas. Reg. § 1.132-3T(b)2(ii) (1985) states: "The price . . . cannot reflect any quantity discount unless the employee actually purchases the requisite quantity of the property or service."

[200]I.R.C. § 162(a) (Law. Co-op. 1986) states: "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ."

[201]I.R.C. § 167(a) (Law. Co-op. 1986) states: "There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear . . . (1) of property used in a trade or business, or (2) of property held for the production of income." *See supra* note 64 and accompanying text.

required to pay for the property or service.[202] Thus, according to the wording of the statute, a flight appears to be deductible to the employee so long as the employee uses it for business, *anyone's* business.[203] However, the Internal Revenue Service immediately plugged this loophole in the law; a temporary Treasury regulation ensures that the exemption is only available if the fringe benefit is used for the *employer's* business and not for a side business belonging to the employee.[204] As the previous discussion shows, although the name "working condition fringe benefits" seems to imply that flights earned by travel during working hours should be exempt because the right conferred came about as a condition of work, they cannot be excluded from gross income under this subsection.

Fourth, the final exemption, de minimus fringe benefits,[205] excludes the amount of fringe benefits received if the amount of the benefit is small or the record-keeping required is so complex as to be burdensome.[206] In order to determine whether frequent flyer bonuses qualify for exclusion under this provision, the methods of analysis suggested by the Treasury regulations must be applied to frequent flyer bonuses and the intent of Congress in passing the fringe benefit legislation must be re-examined.

The first method of analysis provided by the regulations is based on three factors that are weighed to determine whether a fringe benefit is impracticable to track, thus qualifying for exclusion as de minimus.[207] The first factor is the value of the benefit: as it increases, the benefit is more likely to be taxable.[208] Therefore, if the frequent flyer bonus is a vacation worth thousands of dollars,[209] it does not appear to meet the requirement of small value.

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[202]I.R.C. § 132(d) (Law. Co-op. 1986) states: "[T]he term 'working condition fringe' means any property or services provided to an employee of the employer to the extent that, if the employee paid for such property or services, such payment would be allowable as a deduction under section 162 or 167."

[203]*See id.*

[204]Temp. Treas. Reg. § 1.132-5T(a)(2) (1985). The illustration in the regulation concerns a payment by company A for an employee's airline ticket so that the employee, who is a director of company B, can attend the board of director's meeting of company A. The flight is not excludible from the employee's income as a working condition fringe.

[205]I.R.C. § 132(e)(1) (Law. Co-op. 1986) states: "The term 'de minimus fringe' means any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer's employees) so small as to make accounting for it unreasonable or administratively impracticable."

[206]Temp. Treas. Reg. § 1.132-6T(a) (1985).

> Gross income does not include the value of a de minimus fringe provided to an employee. The term 'de minimus fringe' means any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer's employees) so small as to make accounting for it unreasonable or administratively impracticable. *Id.*

[207]*Id.* at (b)-(c).

[208]*See id.* at (a)-(f).

[209]*See id.*

The second factor is the frequency of receipt: the more infrequently the fringe benefit is supplied, the more likely it is to qualify as de minimus.[210] For example, the receipt of a daily free lunch by one employee as compared to the receipt of a free lunch only once a month by another employee may result in a de minimus fringe benefit to the occasional recipient and gross income to the daily recipient.[211] However, if each employee's receipts under fringe benefit programs cannot be ascertained, frequency of all similar fringes may be looked at together.[212] For instance, employee use of a company Xerox machine may be very unequal, but employers may ignore that inequality so long as the entire non-business use does not exceed 15% of all of the machines.[213] Frequent flyer bonuses are received infrequently because of the large amount of miles required to be flown;[214] therefore, the requirement of infrequent receipt has been met.

The third factor is impracticality of administration: any benefit which is not excluded by another section and is not unreasonable or administratively impracticable to account for must be included in the employee's income.[215] For example, cash fringe benefits, regardless of size, are not excludible.[216] By comparison, however, any benefit that is unreasonable or administratively impracticable to account for should not be included in the employee's income.[217] Bonus flights definitely meet this requirement because it is extremely difficult for employers to track frequent flyer bonuses received by employees. Because the airlines have aimed the bonus programs at individual business travelers[218] and because the airlines send the bonuses directly to those travelers,[219] administration of the awards by the employer is burdensome.[220] Therefore, the requirement of administrative impracticality is met. However, because the outcome of the value factor analysis conflicts with the outcome of the frequency and practicality factors, further analysis is required.

The second method of analysis provided by the regulations is a list of excludible and nonexcludible fringe benefits.[221] Excludible benefits listed are coffee and doughnuts, occasional typing of personal letters by

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[210]Temp. Treas. Reg. § 1.132-6T(b) (1985).

[211]*Id.*

[212]*Id.*

[213]*Id.*

[214]*Who? supra* note 38, at 77. "A huge amount of mileage is required to qualify for a free ticket." *Id.*

[215]Temp. Treas. Reg. § 1.132-6T(c) (1985).

[216]*Id.*

[217]*Cf. id.* This premise is the converse of the one actually stated in the regulation.

[218]*See supra* notes 96-101 and accompanying text.

[219]*See supra* notes 107-12 and accompanying text.

[220]*See* Temp. Treas. Reg. § 1.132-6T(c) (1985).

[221]Temp. Treas. Reg. § 1.132-6T(f) (1985).

a company secretary, occasional use of a copying machine, occasional cocktail parties or picnics, occasional tickets to theater or sporting events, and low cost holiday presents;[222] all of which have low market value. By contrast, includible fringe benefits are more valuable—they include season tickets for sporting events or the theater, athletic or country club memberships, the commuter use of a company vehicle and use of an employer-owned hunting lodge, apartment or boat for a weekend.[223] Although one form of frequent flyer bonus, an upgrade to first class,[224] resembles an excludible fringe benefit because of its low value, frequent flyer bonus flights, because of their high value and usual personal use, either as a vacation trip or as a commodity to be sold,[225] resemble the non-excludible types of benefits more than the excludible ones.

Finally, Congress' goals in passing the fringe benefit legislation must be considered to determine if fringe benefits should be excludible as a de minimus fringe benefit. Congress' first objective was to allow compensation without taxation if there was a valid business purpose besides compensation.[226] Most employers allow employees to keep the bonuses for compensation and employee relations;[227] thus, bonus flights do not meet Congress' first objective for fringe benefit legislation. Congress' second objective was to ensure that no shifting or shrinking of the tax base could occur.[228] Allowing frequent flyer benefits to be excluded under the de minimus fringe benefit exclusion shifts the tax base from those whose jobs favor the earning of the flights to those whose jobs do not because the frequent flyer is not taxed on an awarded two thousand dollar vacation while a non-travelling co-worker is taxed on the two thousand dollars he earned to pay for a similar vacation.[229] Therefore, bonus flights do not meet the second objective, either.

Thus, despite the infrequency of receipt and the difficulty of the employer's record-keeping, frequent flyer bonuses do not qualify for exclusion under section 132. Because of the high value of the bonuses, their similarity to the examples of non-excludible fringe benefits listed in the regulations and Congress' goals in passing the legislation, frequent flyer bonuses will be includible in the employee's gross income.

V. The Amount of Income—What is the Bonus Worth?

After determining that a frequent flyer bonus constitutes income to recipients, the dollar amount of income must be determined. The first

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[222] *Id.* at (f)(1).

[223] *Id.* at (f)(2).

[224] *See infra* text accompanying notes 239-40.

[225] *See supra* text accompanying notes 22-28; *see also supra* notes 38-46 and accompanying text; *see also supra* notes 137-39 and accompanying text.

[226] Explanation, *supra* note 168, at 840.

[227] *See supra* text accompanying notes 132-39.

[228] Explanation, *supra* note 168, at 841.

[229] *See id.*

step in the analysis is the rule that the fair market value of the property or service received must be included in income.[230] In *McCoy v. Commissioner*,[231] fair market value was defined by the Tax Court as the going rate at which the commodity can be purchased, not its retail price.[232] In that case, the IRS claimed that the retail price of an automobile given to an employee must be included in the employee's gross income.[233] The court held that fair market value is not necessarily retail price; it is the market price.[234] The court took judicial notice of the common fact that an automobile, once sold, is worth less than retail even if it has no miles on the odometer.[235] Therefore, because the employer who awarded the car was the original purchaser, the fair market value of the car was not equal to retail price when received by the employee.[236] Thus, fair market value is the going rate at which the commodity can be purchased, not its retail price.[237] As applied to frequent flyer bonuses, *McCoy* suggests that an award recipient may be required to include only the amount of income generated by using the price of a similar flight on a less expensive airline because the lower price is the market price.[238]

Furthermore, one tax commentator suggests that a different type of frequent flyer bonus, an upgrade from coach class seating to first class at no extra charge, should not be considered a taxable event because it is minor, incidental, impossible to keep track of, and costs the airline nothing extra.[239] By analogy, if the awarded bonus flight is a first class flight, only the coach rate should be included in taxpayer's gross income. An airline's willingness to upgrade seating[240] demonstrates that coach fare is the market value of an airline trip; subjectively, the taxpayer should not be charged more.

Finally, in *Turner v. Commissioner*,[241] the Tax Court held that because a trip to South America could not be transferred to a third

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[230]Treas. Reg. § 1.61-2(d)(1) (as amended in 1979). "[I]f services are paid for in property, the fair market value of the property taken in payment must be included in income as compensation."

[231]38 T.C. 841 (1962).

[232]*Id.* at 844.

[233]*Id.* at 843.

[234]*Id.* at 844.

[235]*Id.*

[236]*Id.*

[237]*See id.*

[238]*Cf. id.* Fair market value is a price at which a commodity is available in the marketplace; therefore, the lower priced airfare reflects fair market value. *See id.*; *see also supra* notes 38-46 and accompanying text.

[239]Aidinoff, *supra* note 74, at 1348.

[240]The six major frequent flyer programs, American, Delta, Eastern, Pan Am, TWA and United, all offer an upgrade to first class at 10,000 miles. This upgrade is the first award available and 10,000 miles is the lowest number of miles that will win any award in all of the programs. *New Deals*, *supra* note 5, at 170.

[241]13 T.C.M. (CCH) 462 (1954).

party, it was income only to the extent of its subjective worth to the recipient.[242] Because the taxpayers could prove the subjective worth of the trip was very small and because they could not sell it, the court held that an amount less than the fair market value of the trip should be includible in the taxpayer's gross income.[243] Similarly, if a frequent flyer bonus flight is not readily transferable[244] and a traveler is being issued a bonus of small subjective worth,[245] receipt of the bonus should only slightly increase the recipient's gross income. However, this rule will not reduce the employee's income recognition below the amount for which the traveler could sell the bonus.[246]

VI. Wages or Not?—The Withholding Dilemma

If a bonus flight is included in the gross income of the employee because it passes from the employer to the employee and cannot be excluded under any of the previously discussed exclusionary sections, the next question for consideration is whether or not the flights are to be considered "wages" under the Code. Generally, if any payment from the employer to the employee is considered wages, the employer must withhold social security and federal income tax on the payment.[247] The Code states that wages includes all remuneration, including non-cash remuneration, "*for services performed by an employee for his employer.*"[248] Case law helps delineate the difference between wages and other types of income.[249] In *Royster v. United States*,[250] the Fourth Circuit Court of Appeals rejected as overbroad the Internal Revenue Service's contention that the primary question in determining whether

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[242]*Id.* at 463.

[243]*Id.*

[244]*See supra* notes 44-46 and accompanying text. The fair market value of frequent flyer bonuses upon their sale is somewhat constrained by the limits on their marketability, such as airlines that permit only same surname transfers. Toy, *supra* note 38, at 88.

[245]Sherman, *supra* note 1, at 106. A travel agent states, "Many of our customers tell us the last thing they want is more flying." *Id.*

[246]*See supra* notes 38-46 and accompanying text.

[247]I.R.C. § 3402(a) (Law. Co-op. 1986) states: "[E]very employer making payment of wages shall deduct and withhold a tax . . . ."

[248]I.R.C. § 3401(a) (Law. Co-op. 1986) (emphasis added). "For the purposes of this chapter, the term 'wages' means all remuneration performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash . . . ." *Id.*

[249]Central Ill. Pub. Serv. v. United States, 435 U.S. 21 (1978) (lunch reimbursements not wages for withholding purposes); Allstate Ins. Co. v. United States, 530 F.2d 378 (Ct. Cl. 1976) (indirect moving expenses not wages for withholding purposes); Royster Co. v. United States, 479 F.2d 387 (4th Cir. 1973) (meal reimbursements not wages for withholding purposes); Acacia Mut. Life Ins. Co. v. United States, 272 F. Supp. 188 (D. Md. 1967) (convention trips not wages for withholding purposes).

[250]479 F.2d 387 (4th Cir. 1973).

amounts were wages was to determine if amounts paid were "due to the employment relationship."[251] The court held that not all payments from employer to employee were necessarily wages subject to withholding.[252] In another case, *Acacia Mutual Life Insurance Co. v. United States*,[253] the U.S. District Court for the District of Maryland stated that it is the purpose of the employer that controls in determining whether payments are wages.[254] Therefore, if frequent flyer bonuses are given as remuneration, they should be considered wages.

Furthermore, in *Central Illinois Public Service v. United States*,[255] the Supreme Court held that withholding is a narrow concept and is definitely not required unless a payment constitutes wages.[256] The Internal Revenue Service wanted to enforce withholding on taxable lunch reimbursements paid to employees by their employer;[257] although taxable to the employees, the amounts were not wages because they were not remuneration for services.[258] The Court conceded that if a payment was considered to be wages the employer would be obligated to withhold,[259] but reasoned that there was a large gap between the premise that income was taxable and the conclusion that the employer was therefore responsible for withholding simply because he made the payment.[260] Therefore, if frequent flyer bonuses are wages in remuneration for services rendered, the employer will be required to withhold on them; in contrast, if the bonuses are by way of expense reimbursement or some other payment not recognizable as wages, then the employer need not withhold.[261] Because the employer is usually allowing the employee to keep the bonus flight as an incentive to produce,[262] it is remuneration for services performed. Thus, despite the employer's difficulty in tracking the employee's receipt of frequent flyer bonus income, the bonus con-

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[251] *Id.* at 390. The court stated, "We are of the opinion that the term wages is narrower than the term income as used in the provisions relating to how an individual must treat payments to him. Wages are merely one form of income." *Id.* The court continued, "We believe that the question here is whether the payments at issue were made to the employees of Royster as remuneration for services performed." *Id.* The court held that the lunch reimbursements were not attributable to the service of the employee because the salesmen were not on call during lunch and received the lunch reimbursement whether or not they made sales on that day. *Id.* at 391-92.

[252] *Id.* at 390.

[253] 272 F. Supp. 188 (D. Md. 1967).

[254] *Id.* at 195.

[255] 435 U.S. 21 (1978).

[256] *Id.* at 29.

[257] *Id.* at 23.

[258] *Id.* at 28.

[259] *Id.* at 25.

[260] *Id.* at 29.

[261] *See id.*

[262] *See supra* text accompanying notes 132-39.

stitutes wages and it appears that the employer is required to withhold on it.

However, although frequent flyer bonuses are wages because they are remuneration for services performed for the employer, they are not wages for the employer's withholding purposes because of a statutory exception to the definition of the word "employer."[263] Section 3401(d) of the Code states that if the employer for whom the services were performed does not have control of the payment of the wages, the payor of the wages becomes the employer for the purposes of withholding.[264] Although redefining the word "employer" solves the employer's withholding difficulty, it appears to shift the burden of withholding to the airlines, which are statutorily considered to be the "employer" because they made the payments.[265] Unfortunately, the airlines have an even greater burden in withholding than the employer because the airline has no information about the frequent flyer's status as an employee and has none of the traveler's funds from which to withhold.

However, two 1970 Revenue Rulings discuss situations that are analogous to the frequent flyer bonus situation. In one ruling,[266] the IRS held that a distributor's award of "prize points" to its dealer's salesmen, under a system that allowed salesmen to earn points toward cataloged merchandise prizes to be sent directly to the salesmen, was income to the recipient.[267] However, the IRS also held that the value of the points awarded was not "wages" for withholding purposes.[268] In the second ruling,[269] a manufacturer paid sales volume bonuses to its dealer's salesmen even though it did not have control over the salesmen or a common law employment relationship with them. The IRS held that section 3401(d) did not require the manufacturer to withhold because the bonuses "are

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[263]I.R.C. § 3401(d) (Law. Co-op. 1986) states:

> For purposes of this chapter, the term 'employer' means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that—(1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term 'employer' means the person having control of the payment of such wages. . . .

[264]*Id.*

[265]Notice that for gross income inclusionary purposes, the *employer* awards the bonus when he allows the employee to keep a benefit that is an accession to the employee's wealth and gross income because the employee did not pay for the underlying tickets and so cannot treat the bonus as a volume discount. *See supra* text accompanying notes 122-39. However, for employment tax purposes, the *airline* is considered to have awarded the bonus because the Code redefines the word "employer" as being the person who controls the payments. I.R.C. § 3401(d) (Law Co-op. 1986).

[266]Rev. Rul. 70-331, 1970-1 C.B. 14.

[267]*Id.* at 15.

[268]*Id.*

[269]Rev. Rul. 70-337, 1970-1 C.B. 191.

not remuneration for services performed for the dealer who employs the salesmen, but are remuneration for services rendered to the [manufacturer] and as such are not wages subject to withholding."[270]

Similarly, for withholding purposes, the award of a bonus flight by the airlines is not remuneration for services performed for the employer who paid for the flights even though the employer's reason for allowing the employee to keep the bonus may be remunerative.[271] Instead, by awarding the bonus, the airline, with no right to exercise control over the employee, is rewarding that employee for brand loyalty.[272] Thus, it appears that neither the airline nor the employer is required to withhold on a frequent flyer bonus award.

VII. The Reporting Burden—Employee, Employer or Airline?

The final issue for consideration is who should be required to report the gross income generated by the issuance and receipt of a frequent flyer bonus to the Internal Revenue Service. Three possibilities exist: the employee, the employer, or the airline could be required to report. First, the employee could be responsible for the reporting function. Despite the fact that it would be least burdensome for all parties to require the employee to report, past experience shows that the individual is least likely to comply with reporting requirements.[273] Therefore, the frequent flyer should not be responsible for the reporting function.

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[270]Rev. Rul. 70-331, *supra* note 266, at 15 (interpreting Rev. Rul. 70-337, *supra* note 269). Rev. Rul. 70-337, *supra* note 269, explained the reasoning of the IRS as follows:

> Section 3401(d)(1) of the Code provides in part, that if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term "employer" . . . means the person having control of the payment of such wages.
>
> Under the fact presented, the [manufacturer] is not the employer of the salesmen within the meaning of section 3401(d)(1) of the Code.
>
> The "bonuses" paid to the salesmen by the [manufacturer] whether directly or through an agent (the dealer), are not remuneration for services performed for the dealer who employs the salesmen, but are remuneration for services rendered to the [manufacturer]. Under the facts presented, the salesmen are not employees of the [manufacturer] under the usual common law rule and, therefore, the "bonuses" paid by it to the salesmen employed by the dealers are not wages for the purposes of [withholding]

Id. at 192.

[271]*See supra* text accompanying notes 132-39.

[272]*Richer Rewards*, *supra* note 1, at 89.

[273]For example, Congress has found it necessary to implement many penalties for individuals' failure to report and pay tax. *E.g.*, I.R.C. § 6651 (Law. Co-op. 1986) (penalty for failure to file return or pay tax); I.R.C. § 6653(a)(1) (Law. Co-op. 1986) (penalty for negligence or intentional disregard of the rules and regulations); I.R.C. § 6653(b) (Law. Co-op. 1986) (penalty for fraud); I.R.C. § 6654 (Law. Co-op. 1986) (penalty for underpayment of estimated tax); I.R.C. § 6661 (Law. Co-op. 1986) (penalty for substantial

The second option is to require employers to report, however, employers are not required to withhold because the payment is received from a third party.[274] Similarly, the employer should not be required to report because the payment is received from a third party.[275] Because employers cannot track the employee's use of frequent flyer bonuses without excessive cost in order to reclaim the bonuses from the employees,[276] it would be impossible to require an employer to track the bonuses for reporting purposes. Therefore, the employer should not be required to report the frequent flyer bonuses awarded by airlines.

The third option, requiring the airlines to report, is the most practical in terms of accessibility of information. The airlines already possess the centralized records that would yield most of the information necessary.[277] Because the airlines send monthly statements to program participants' homes showing the balance of miles flown and bonuses available,[278] the airlines must have the participants' names and addresses. Similarly, the airlines must keep track of the amount and nature of bonuses awarded to maintain the participants' mileage balances.[279] Therefore, the only additional information the airlines need to enable them to report is the social security number of the recipient.[280]

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understatement of liability). Moreover, Congress has also implemented a multitude of reporting and withholding requirements by payors of income. *E.g.*, I.R.C. § 6041 (Law. Co-op. 1986) (reporting of information at source); I.R.C. § 6042 (Law. Co-op. 1986) (reporting of dividends); I.R.C. § 6044 (Law. Co-op. 1986) (reporting of patronage dividends); I.R.C. § 6045 (Law. Co-op. 1986) (reporting of broker and barter transactions); I.R.C. § 6049 (Law. Co-op. 1986) (reporting of interest); I.R.C. § 6050E (Law. Co-op. 1986) (reporting of state and local income tax refunds); I.R.C. § 3402(o) (Law. Co-op. 1986) (withholding on supplemental unemployment compensation, annuities and sick pay); I.R.C. § 3402(q) (Law. Co-op. 1986) (withholding on gambling winnings).

[274]I.R.C. § 3401(d) (Law. Co-op. 1986); *see supra* note 263 and accompanying text.

[275]*See id.* If an employer is not required to withhold because the payment is made by a third party, then the employer should not be required to report because the payment is made by a third party. *See also infra* note 263 and accompanying text.

[276]*E.g.*, *Who?*, *supra* note 38, at 77; Sherman, *supra* note 1 at 108. Travel agencies have created services to track the number of bonus miles flown by getting information from the airlines and matching it to employer's employee listings. There has been little demand for the services, apparently because of high cost and employee relations aspects. *See also supra* text accompanying notes 132-39.

[277]*E.g.*, UNITED AIRLINES, INC., MILEAGE PLUS PROGRAM GUIDE 6 (1987). United sends a monthly statement if activity is recorded in a frequent flyer's account. Included is a detailed listing of mileage activity and Bonus Bank activity.

[278]*Id.*

[279]*Id.* For discussion of problems related to fair market value of the bonus, *see supra* text accompanying notes 241-46; *see also infra* text accompanying notes 281-87.

[280]*Cf.* I.R.C. § 6042 (Law. Co-op. 1986) (reporting of dividends); I.R.C. § 6044 (Law. Co-op. 1986) (reporting of patronage dividends); I.R.C. § 6045 (Law. Co-op. 1986) (reporting of broker and barter transactions); I.R.C. § 6049 (Law. Co-op. 1986) (reporting of interest). Reporting requirements for all of these payments consist of name, address, social security number, and amount.

Furthermore, there is precedent for requiring the airlines to report the total amount of bonus awarded, regardless of taxability, by comparison with the reporting requirements for patronage dividends. A member of a farmer's cooperative earns monetary patronage dividends due to purchases and sales entered into by the cooperative.[281] State statute requires that the cooperative, a non-profit organization, share its profit with its members through patronage dividends.[282] Dividends paid because of the member's purchase of personal or depreciable assets are not gross income to the recipient.[283] Other dividends earned on the member's sales through the cooperative and by sales the cooperative makes to non-members are treated as gross income by the recipient.[284] However, for reporting purposes, the cooperative is not required to determine which amounts are income to the member.[285] Instead, the cooperative is required to report the amounts to its members and the IRS.[286] The members are responsible for allocating the dividends into taxable and non-taxable portions.[287] A similar system should be adopted for the reporting of frequent flyer bonuses because the airline would not be responsible for deciding who received income. Instead, it would only be responsible for preparing a statement for everyone who received a frequent flyer benefit.

Finally, if the airline reports the fair market value of frequent flyer bonuses awarded, the treatment of frequent flyer bonus income will be consistent with the "Information at Source" reporting requirements of the Code.[288] Under these requirements, payments of $600 in any year

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[281]INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY, PUB. NO. 225, FARMER'S TAX GUIDE 10 (1983) [hereinafter FARMER'S TAX GUIDE].

[282]IND. CODE § 15-7-1-13(f) (1982). This section provides that all net earning or savings in excess of amount needed to restore a deficit, pay stock dividends and maintain reserves shall be distributed on a patronage basis, either to members and non-members or to members only.

[283]FARMER'S TAX GUIDE, at 10.

[284]*See id. See generally* THE INDIANA FARM BUREAU COOPERATIVE ASSOCIATION INC., COOPERATIVES THE AMERICAN WAY ¶¶ 8-10; THE INDIANA FARM BUREAU COOPERATIVE ASSOCIATION INC., FACTS ¶¶ 8, 12-15.

[285]Treas. Reg. § 1.6044-5(b)(1) (as amended in 1977). The statement shall "[s]how the aggregate amount of payments shown on the return as having been made to such persons. . . ."

[286]Treas. Reg. § 1.6044-3 (1962) (lists amounts required to be reported to the IRS by cooperative organizations).

[287]*See* Treas. Reg. § 1.6044-5(b)(1) (as amended in 1977).

[288]I.R.C. § 6041(a) (1986) states:

> All persons engaged in a trade or business and making payment in the course of such trade or business to another person, of rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits and income . . . of $600 or more in any taxable year . . . shall render a true and accurate return . . . setting for the amount . . . and the name and address of the recipient of such payment.

must be reported at the source of the payment by the payor.[289] When it awards a bonus, the airline is the preliminary source of the bonus and is making a payment in connection with its trade or business because the bonuses are paid and deducted by the airline as a promotional expense.[290] Thus, the airline should be required to send information statements to the recipient and to the Internal Revenue Service in order to be consistent with other information at source requirements. Also, the airline is in a better position to report than the employer because the airline is reporting information already collected in the course of everyday transactions.

VIII. Conclusion

Frequent flyer bonus awards are not income to a person who purchases the underlying flights because the bonus should be considered to be a rebate or volume discount taken over time. Therefore, no income is realized by frequent flyers who buy their own tickets to earn flights. Furthermore, generally, if the purchaser of the underlying flights transfers an earned bonus to a third party, the purchaser of the underlying flights will recognize income only to the extent of any compensation received for the bonus given up.

If, however, the "purchaser" of the underlying flights is an employer, and if the employee who earned the mileage credit is allowed to retain the bonus, the employer should properly be considered the purchaser because without the employer's payment for the underlying tickets, the bonus could not have been earned. Therefore, the employer has "transferred" the bonus to the employee even if the employee receives it directly from the airline. Furthermore, the employment relationship requires that the employee recognize gross income to the extent of the fair market value of the bonus received as adjusted by the subjective worth of the bonus to the employee. Because the courts have consistently been reluctant to infer gratuitous motives to the employment relationship, the bonus has been transferred to the employee as a form of remuneration and not as a gift.

The income thus allocated to an employee by the receipt of a bonus flight for personal use cannot be excluded under the gift or prize and award exclusionary sections of the Code. Furthermore, despite the fact that a literal reading of the de minimus fringe benefit rules implies exclusion, Congress' intent when they promulgated the rules indicates that the inclusive gross income concept requires the recognition of the bonuses as income.

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[289] *Id.*

[290] *See supra* notes 16-21 and accompanying text.

If bonus flights are transferred to the employee for the purpose of "remuneration for services performed" instead of for some other business purpose, frequent flyer bonuses are not simply income; they are also "wages." However, because of the statutory exception that an employer who is not in control of the payment of the wages cannot be an employer for the purposes of withholding on those wages, the employer is not required to withhold on the income generated. The airline is not required to withhold, either; it does not meet the common law definition of employer because it has no control over frequently flying business travelers. Thus, neither the employer nor the employee is required to withhold on the amount received as a frequent flyer bonus.

Finally, the recipient should not be required to report the income received. Past experience shows that irregularities in tax treatment would result as income recipients often do not properly report income received. Similarly, the employer should not be required to report because acquiring the necessary information would be too burdensome. Therefore, because most of the information required for reporting has been accumulated by the airlines, it is logical to put the burden of reporting the amount of income due to the awarding of frequent flyer benefits on the airlines.

Kathryn Symmes Hall

A TIME TO BE BORN AND A TIME TO DIE

A Pregnant Woman's Right to Die with Dignity

"For everything there is a season, and a time for every matter under heaven: a time to be born and a time to die; a time to plant and time to pluck up what is planted." Ecclesiastes 3:1,2

Since the beginning of time man has been faced with the inevitable fact that he must die. In recent years our technology has devised ways to put off that eventuality, at least temporarily. For many, the technological advances have added productive and meaningful time to their lives. For others, it has only prolonged the agony of the dying process. The right to end this process in a humane way has been the subject of numerous articles, books and court decisions.[1] This Note focuses on one dying person in particular, the pregnant woman.

Because of technological improvements in both cardiopulmonary resuscitation and life-support systems, there will be an increasing number of pregnant women who are brain dead or chronically vegetative.[2] In addition, the advances in medical science will sustain pregnant women who previously would have rapidly succumbed to terminal illnesses. It is estimated that cancer and pregnancy will occur simultaneously in 3,472 women per year.[3] One out of every 118 women who have cancer are pregnant.[4] Physicians and the court systems will be faced with new legal, medical and ethical problems inherent in this situation.

The legislature and courts have developed means by which a terminally ill person may arrange to forego or discontinue medical treatment which only serves to prolong the process of dying.[5] This is recognized

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[1]*See generally* DEATH, DYING AND EUTHANASIA (Horan & Mall ed. 1980); LEGAL AND ETHICAL ASPECTS OF TREATING CRITICALLY AND TERMINALLY ILL PATIENTS (Doudera & Peters 1982); P. RIGA, RIGHT TO DIE OR RIGHT TO LIVE? LEGAL ASPECTS OF DYING AND DEATH (1981); R. VEATCH, DEATH, DYING AND THE BIOLOGICAL REVOLUTION (1976); Bryan, *How Dignified a Death? Living Wills*, 1985 MED. TRIAL TECH. Q. 209; Bryn, *Compulsory Lifesaving Treatment for the Competent Adult* 44 FORDHAM L. REV. 1, (1975); Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228 (1973); Gelfand, *Euthanasia and the Terminally Ill Patient*, 63 NEB. L. REV. 741 (1984); Schwartz, *Patients' Right to Refuse Treatment: Legal Aspects, Implications and Consequences*, 1986 MED. TRIAL TECH. Q. 430; and Note, *The Right to Die — A Current Look*, 30 LOY. L. REV. 139 (1984).

[2]Hill, Parker, & O'Neill, *Management of Maternal Vegetative State During Pregnancy*, 60 MAYO CLINIC PROC. 471 (1985) [hereinafter *Maternal Vegetative State*].

[3]Iochim, *Non-Hodgkin's Lymphoma in Pregnancy*, 109 ARCHIVES OF PATHOLOGY AND LABORATORY MED. 803 (1985).

[4]Excluding basal cell carcinoma and in situ lesions. *Id.*

[5]*See infra* notes 9-13, 18-37, and 127-29 and accompanying text.

as humane and necessary by both the legal and medical communities. The Supreme Court of the United States has also recognized an interest in the potential life of a viable fetus.[6] When confronted with a woman who is both dying and pregnant there is a clash between these two interests. Because the right to die has been recognized by many courts as an aspect of the constitutional right of privacy,[7] a balancing test must be performed to determine if concern for the fetus compels state intervention. This no-win situation will be influenced by the facts of the case, such as state of fetal development and maternal condition. This Note will attempt to identify those factors which a decision-maker may find relevant in making this difficult choice.

I. The Right to Die

> *"Wherefore death is indeed . . . good to none while it is actually suffered, and while it is subduing the dying in its power."* St. Augustine, City of God, Book VI, Chpt. XIII.

A. The Common Law

The common law foundation for the right to die is the right to be free from unwanted bodily invasion. The courts have long recognized the importance of a person's bodily integrity. This fundamental concept was articulated by Justice Gray:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law . . . . "The right to one's person may be said to be a right of complete immunity; to be let alone."[8]

Another who violates that right without consent commits a battery.[9] This includes a physician who performs any procedure, no matter how beneficial or necessary,[10] without first obtaining the informed consent of the patient. Justice Cardozo stated, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his

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[6]Roe v. Wade, 410 U.S. 113 (1973).

[7]*See infra* note 18.

[8]Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (quoting T. Cooley, A Treatise on the Law of Torts 29 (2d ed. 1888)).

[9]Prosser, Handbook of the Law of Torts § 9 (4th ed. 1971).

[10]Mohr v. Williams, 95 Minn. 261, 268, 104 N.W. 12, 16 (1905).

patient's consent commits an assault, for which he is liable in damages."[11]

This doctrine of informed consent protects both the patient and the physician. Because of this safeguard, the patient may not be required to submit to unwanted procedures. By withholding or withdrawing his consent he may decline even life saving medical treatment.[12] By the same mechanism, the physician is relieved of liability from the consequences of honoring the patient's decision.[13]

Some jurisdictions base the right to die solely on this common law right of self-determination.[14] The New York Court of Appeals, in the case *In re Storar*,[15] expressed an unwillingness to recognize a constitutional basis for this right since the Supreme Court had repeatedly refused to grant certiorari in a number of similar cases.[16] In addition, it found the patient adequately protected by the common law.[17]

B. The Right of Privacy

Despite the Supreme Court's unwillingness to address the matter, most courts that have decided cases on this issue have recognized the right to die as having a basis in the constitutional right of privacy.[18] This right is not explicitly mentioned anywhere in the Constitution.[19] The Supreme Court in *Griswold v. Connecticut*[20] "found" the right of privacy in the penumbras of the Bill of Rights.[21] This newly discovered right was further expanded and solidified in subsequent cases.[22]

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[11]Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914).

[12]*In re* Storar, 52 N.Y.2d 363, 378, 420 N.E.2d 64, 71, 438 N.Y.S.2d 266, 273, *cert. denied sub nom.* Storar v. Storar, 454 U.S. 858 (1981).

[13]*In re* Storar, 52 N.Y.2d 363, 378, 420 N.E.2d 64, 71, 438 N.Y.S.2d 266, 273 (1981).

[14]*See, e.g.*, *In re* Storar, 52 N.Y.2d 363, 377-78, 420 N.E.2d 64, 70, 438 N.Y.S.2d 266, 272-73 (1981).

[15]52 N.Y.2d 363 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied sub nom.* Storar v. Storar, 454 U.S. 858 (1981).

[16]*Id.* at 377-78, 420 N.E.2d at 70, 438 N.Y.S.2d at 272-73.

[17]*Id. See also* Winters v. Miller, 446 F.2d 65 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971); Jones v. Director of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964); *In re* Quinlin, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied*, 429 U.S. 922 (1976).

[18]*See, e.g.*, Severns v. Wilmington Medical Center, Inc., 421 A.2d 1334 (Del. 1980); Satz v. Perlmutter, 379 So.2d 359 (Fla. 1980); Superintendent of Belchertown State School v.Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re* Quinlin, 70 N.J. 10, 355 A.2d 647 (1976); Leach v. Akron General Medical Center, 68 Ohio Misc. 1, 426 N.E.2d 809 (1980).

[19]Roe v. Wade, 410 U.S. 113, 153 (1973).

[20]381 U.S. 479 (1965) (the right of privacy encompasses the right of married persons to use contraceptives).

[21]*Id.* at 484.

[22]*See* Stanley v. Georgia, 394 U.S. 557 (1969) (the right to possess obscene materials

The right of privacy does not concern privacy in the conventional sense. Rather, it provides a more far reaching right to personal autonomy or freedom from government regulation.[23] It allows an individual to make certain decisions without interference from the government. The types of decisions falling into this zone of privacy are personal decisions involving one's self or one's family, which must be important decisions which affect one's life.[24] The Supreme Court stated, "'[O]nly personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy.'"[25] The cases in which courts have upheld this right of privacy have involved decisions concerning marriage, procreation, contraception, family relationships, child rearing and education.[26]

Although the Supreme Court has never considered a case involving euthanasia, the right to refuse treatment, or the right to die, a number of state and lower federal courts have decided that these types of cases are controlled by the constitutional right of privacy.[27] The New Jersey Supreme Court in its highly publicized case, *In re Quinlin*,[28] referred to the Supreme Court's decision in *Roe v. Wade*[29] and equated the right to die with the right to have an abortion.[30]

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is included in the right of privacy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (the right of privacy extends to the distribution of contraceptives to unmarried persons); Roe v. Wade, 410 U.S. 113 (1973) (the right of privacy encompasses a woman's decision to terminate her pregnancy).

[23]This concept is explained fully in Henkin, *Privacy and Autonomy*, 74 COL. L. REV. 1410, 1411 (1974).

[24]Andrews v. Ballard, 498 F.Supp. 1038, 1046 (S.D. Tex. 1980) (paraphrasing Carey v. Population Services, 431 U.S. 678, 684-85 (1977)).

[25]Roe v. Wade, 410 U.S. 113, 152 (1973) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[26]Roe v. Wade, 410 U.S. 113, 152 (1973) (citing Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (procreation); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (contraception); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (child rearing and education)). *But see* Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (constitutionally protected right of privacy does not include right to engage in acts of homosexual sodomy in one's own home). The author of one article argues that the emphasis on the intimacy of these decisions leads to a conclusion that the right of privacy extends to other intimate matters. He views the list of marriage, procreation, and family life as only examples of the constitutionally protected zones of privacy. Delgado, *Euthanasia Reconsidered: The Choice of Death as an Aspect of the Right of Privacy*, 17 ARIZ. L. REV. 474, 477 (1975).

[27]*See supra* note 18.

[28]70 N.J. 10, 355 A.2d 647 (1976), *cert. denied*, 429 U.S. 922 (1976).

[29]410 U.S. 113 (1973).

[30]"Presumably this right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad

An analogy may be made between the decision to die and the decision to terminate a pregnancy. Both involve highly personal and intimate matters. The right to die may be even more personal if the patient is not pregnant. The termination of life-sustaining treatment involves only consideration of the life of the patient with no question of the life or potential life of anyone else. Both situations involve detrimental effects on the person's future.[31] The Court in *Roe* took into account the serious effects the birth of an unwanted child might have on the mother.[32] Similarly, the life of a terminal patient is detrimentally affected by forcing him to undergo unwanted treatment and prolong a hopeless existence.[33]

Once it was established that a right to die exists,[34] further cases refined the list of those instances in which that right may be exercised. The obstacles confronted in each instance are varied. An important common denominator, however, is the moral and emotional burden on the decision-maker. Various state courts have addressed the problem of who shall decide whether or not to discontinue life support for an incompetent patient who has not formally expressed his desires.[35] A California court has been faced with the decision of whether a patient who is hopelessly ill but not yet terminal may order the withdrawal of necessary treatment.[36] In a number of cases the definition of extraordinary or ordinary treatment is in question. In addition, a state court recently decided whether feeding may be withheld to facilitate the dying process.[37]

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enough to encompass a woman's decision to terminate pregnancy under certain conditions." 70 N.J. at 40, 355 A.2d at 663. This line of reasoning was also followed in other states to support a constitutionally based right to die. *See, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

[31]Delgado, *supra* note 26, at 479.

[32]410 U.S. at 154. These included damage to mental and physical health by child care, the distress of bringing an unwanted child into a family which is unable to care for it and the stigma of unwed motherhood.

[33]Delgado, *supra* note 26, at 479. The author also compared the societal ramifications of both abortion and the right to die decisions. For example, he discussed population growth and allocation of scarce social and personal resources.

[34]That is, established by state courts, not the U.S. Supreme Court. *See supra* notes 16-18 and accompanying text.

[35]*See, e.g.*, John F. Kennedy Memorial Hosp. Inc. v. Bludsworth, 452 So. 2d 921 (Fla. 1983) (if a patient is chronically vegetative, the decision may be made by family members or guardian); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977) (the decision is to be made by substituted judgment, that is the choice must be that which the patient would have made if competent); *In re* Quinlin, 70 N.J. 10, 355 A.2d 647 (1976) (the choice must be the best interests of the patient made by the patient's family together with a hospital ethics committee); *In re* Colyer, 99 Wash.2d 114, 660 P.2d 738 (1983) (requires the appointment of a guardian for the patient).

[36]Bartling v. Superior Court, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1985).

[37]*In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985).

Each new wrinkle sharpens the focus on this newly created right.

C. Compelling State Interest

Whether the right to die is based on a constitutional right of privacy or a common law right to be free from unwanted bodily invasion, that right must be balanced against state interests.[38] Because the decision to die is deemed "fundamental" by many courts and therefore protected from government regulation by the right of privacy, it can only be overcome if the state interest is considered "compelling".[39] The interests which are traditionally focused upon in right to die cases are (1) the preservation of life, (2) the protection of innocent third parties, (3) the prevention of suicide and (4) the maintenance of the ethical integrity of the medical profession.[40] None of these interests directly address the situation of a terminally ill pregnant patient. This traditional litany is not, however, exclusive of any additional interests.[41]

The state interest in preserving the life of a person decreases where treatment is intrusive and only prolongs the dying process.[42] Where the illness is incurable the value of life is not diminished by allowing the patient to refuse life-sustaining treatment.[43] The Supreme Court of Massachusetts stated in *Superintendent of Belchertown State School v. Saikewicz:*

> The constitutional right to privacy, as we conceive it, is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice.[44]

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[38]*See In re* Quinlin, 70 N.J. 10, 40-41, 355 A.2d 647, 663-64 (1976), *cert. denied*, 429 U.S. 922 (1976); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 740, 370 N.E.2d 417, 424-25 (1977); *In re* Storar, 52 N.Y.2d 363, 378, 420 N.E.2d 64, 71, 438 N.Y.S.2d 266, 273 (1981), *cert. denied sub nom.* Storar v. Storar, 454 U.S. 858 (1981).

[39]Roe v. Wade, 410 U.S. at 156.

[40]Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 741, 370 N.E.2d 417, 425 (1977); *In re* Conroy, 98 N.J. 321, 348-49, 486 A.2d 1209, 1223 (1985); Saunders v. State, 129 Misc. 2d 45, 50, 492 N.Y.S.2d 510, 514 (1985); *In re* Colyer, 99 Wash. 2d 114, 122, 660 P.2d 738, 743 (1983).

[41]*See, e.g.*, Cantor, *supra* note 1, at 242-54.

[42]70 N.J. at 41, 355 A.2d at 664; *In re* Colyer, 99 Wash. 2d 114, 122, 660 P.2d 738, 743 (1983).

[43]Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 741-742, 370 N.E.2d 417, 425-426 (1977).

[44]Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 742, 370 N.E.2d 417, 424 (1977).

The interest in the protection of third parties traditionally extends to minor children who will be emotionally and financially harmed by losing their parents.[45] One case which found this interest compelling stressed the abandonment of the patient's child.[46] Some might argue that this interest should encompass the protection of the fetus. This enlargement, however, would be beyond the established concept of this state interest.[47]

It is well accepted that there is a difference between refusing life-sustaining treatment and committing suicide.[48] This is a distinction between allowing a fatal illness to run its natural course and actively seeking death.[49] Unlike suicide, the discontinuance of treatment is not irrational self-destruction.[50] It is an acceptance of death, not a desire for it that motivates the terminal patient.

The court in *Quinlin* stated that there is evidence "that physicians distinguish between curing the ill and comforting the dying; that they refuse to treat the curable as if they were dying or ought to die, and that they have sometimes refused to treat the hopeless and dying as if they were curable."[51] Surveys of physicians show that a majority favor passive euthanasia and believe that it is widely practiced in the medical community.[52] The American Medical Association issued this statement: "The cessation of the employment of extraordinary means to prolong the life of the body where there is irrefutable evidence that biological death is imminent is the decision of the patient and-or his immediate family."[53]

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[45]*Id.*

[46]*In re* Presidents and Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964) (the court ordered the mother of a seven month old infant to submit to blood transfusions although it was against her religious beliefs).

[47]The nature of the third party interest discussed here is not one where the decision has clear, immediate, and adverse effects on the third party such as in *Raleigh Fitkin-Paul Morgan Memorial Hosp.*, *supra*, where a blood transfusion was necessary to preserve the life of a child in utero, as well as the mother. Clearly, different considerations are presented in such a case.

373 Mass. at 743, 370 N.E.2d at 426 n.10. For a discussion of the *Raleigh Fitkin* case see *infra* notes 72-75 and accompanying text.

[48]373 Mass. at 743, 370 N.E.2d at 246 n.11; *In re* Quinlin, 70 N.J. at 43, 355 A.2d at 665.

[49]Byrn, *supra* note 1, at 18.

[50]*Saikewicz*, 373 Mass. at 743, 370 N.E.2d at 426 n.11.

[51]70 N.J. at 47, 355 A.2d at 667.

[52]Passive euthanasia involves withholding life-sustaining measures or "letting the patient go." This is distinguishable from active euthanasia which is taking an active role in helping the person die. Fletcher, *Ethics and Euthanasia* in DEATH, DYING, AND EUTHANASIA 293 (Horen & Mall ed. 1980). *In re* Storar, 52 N.Y.2d 363, 385-86, 420 N.E.2d 64, 75-76, 438 N.Y.S.2d 266, 277-78 n.3 (1981), *cert. denied sub nom.* Storar v. Storar, 454 U.S. 858 (1981).

[53]*Id.*

Although it is probably not a violation of medical ethics to discontinue life-support for a hopelessly ill, dying patient, there might be an ethical problem if that patient is pregnant. A physician who treats a pregnant woman views himself as having two patients, the mother and developing fetus.[54] Therefore, a physician who might have chosen to discontinue treatment if the patient were not pregnant may have to make a contrary decision so as not to violate his obligation to the fetus-patient. Although probably not a decisive factor,[55] this should be considered in balancing the state interest with the woman's right to bodily integrity.

II. Expanding Fetal Rights

Treatment of the fetus by our judicial system today provides some insight into the weight a decision-maker might accord the interest of the fetus in a right to die balancing test. In recent years there has been a trend toward expanding the rights of the fetus. One example is in the law of torts. Within a span of twenty years there was a complete change in the law concerning prenatal injury. Prior to 1946 nearly every jurisdiction denied recovery for injuries to a pregnant woman which resulted in damage to her subsequently born child.[56] In 1946 there was an abrupt reversal of the existing law. By 1967 every jurisdiction held that if the child is born alive he may maintain an action for prenatal injuries.[57] Some courts have even held that if her actions are unreasonable, a mother can be held liable for injuries inflicted on a child due to the mother's negligent pre-natal conduct.[58]

Criminal law has also witnessed a broadened recognition of the fetus. Under common law, in order to sustain a prosecution for homicide the

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[54]Haycock, *Emergency Care of the Pregnant Traumatized Patient*, 2 Emergency Med. Clinics N. Am. 843, 851 (1984), Mahowald, *Obgynethical Issues - Present and Future*, 12 Advances Psychosomatic Med. 166, 168 (1985).

[55]A number of courts have given this state interest little weight. *See* In re Conroy, 98 N.J. 321, 352-53, 486 A.2d 1209, 1225 (1985) (stating, "Indeed, if the patient's right to informed consent is to have any meaning at all, it must be accorded respect even when it conflicts with the advice of the doctor or the value of the medical profession as a whole."). Also, the Massachusetts Supreme Court stated: "[I]f the doctrines of informed consent and right of privacy have as their foundations the right to bodily integrity . . . and control of one's own fate, then those rights are superior to the institutional considerations [of the medical profession]." Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 744, 370 N.E.2d 417, 427 (1977).

[56]Prosser, *supra* note 9, § 55.

[57]*Id.*

[58]*See, e.g.*, Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1980). (a child may sue his mother to recover for discolored teeth allegedly caused by the mother's use of tetracycline while pregnant).

"born alive requirement" must be met.[59] That is, the fetus must be fully brought forth and independent circulation must be established.[60] A number of states have, however, passed statutes which give the fetus greater protection by recognizing the killing of a fetus as a crime separate from homicide.[61] California's legislature went yet beyond these feticide statutes. Under the California Code murder is defined as the "unlawful killing of a human being, *or a fetus*, with malice aforethought."[62] In addition, California also applies its criminal child abuse statutes to fetuses: "A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned."[63]

Unless the statute specifically includes a fetus, courts have always defined the word "person" to exclude an unborn child.[64] The Supreme Court of Massachusetts recently broke that well accepted rule when it became the first jurisdiction to include a viable fetus in its judicial definition of the word "person" for purposes of a penal statute.[65]

These are just a few examples of the nature of the expansion of the recognition of the fetus in the law today. They represent a change in perception. Generally, in the past, the law was viewed as protecting the interests of the subsequently born child. These changes have now granted rights to the fetus as a fetus. This may indicate that courts have a greater interest in protecting the fetus from its mother's decision to die.

III. Prior Balancing Tests

In order to determine whether state interest in the fetus is sufficient to prevail over a woman's fundamental right to die, the two interests must be balanced.[66] The most highly publicized and controversial cases involving the balancing of a woman's rights with fetal rights are the abortion cases. In *Roe v. Wade*,[67] the Court examined the woman's right of privacy, and although the Court found that the constitutional right of privacy was broad enough to encompass her decision to have

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[59]LaFave & Scott, Criminal Law 530-31 (1972). *See also* Keeler v. Superior Court, 2 Cal.3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970); Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983) (specifically upheld the common law rule regardless of viability).

[60]LaFave & Scott, *supra* note 59 at 531.

[61]Fla. Stat § 782.09 (1983); Ill. Ann. Stat. ch. 38 § 9-1.1 (Smith-Hurd 1986); Ind. Code § 35-42-1-6 (1986); Iowa Code § 707.7 (1985); Mich. Comp. Laws § 750.323 (1968); S.D. Codified Laws Ann. § 22-17-6 (1979).

[62]Cal. Penal Code § 187 (West Supp. 1986) (emphasis in original).

[63]*See* Cal. Penal Code § 270 (West Supp. 1986).

[64]*See supra* note 59.

[65]Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984).

[66]*See supra* note 39 and accompanying text.

[67]410 U.S. 113 (1973).

an abortion, it recognized that this right is limited.[68] The pregnant woman cannot be isolated from her fetus.[69] The state interests in the health of the mother and the potential for human life increase during pregnancy.[70] The first becomes compelling at the end of the first trimester, the second at viability.[71]

Other cases which involve the weighing of the interests of the fetus and the mother are refusal of treatment cases. The first of these was *Raleigh Fitkin—Paul Morgan Memorial Hosp. v. Anderson*.[72] A pregnant woman, in conformity with her beliefs as a Jehovah's Witness, refused to accept necessary blood transfusions.[73] The one page decision in the case displays little legal analysis. The court reasoned that since a *child* could be given transfusions over the parent's objections and a *child* could sue its parents for injuries inflicted prior to its birth, then the fetus was entitled to the law's protection.[74] It ignored the legal significance of the common law distinction between a child and a fetus. Further, the court simply disregarded the rights of the mother by stating that, since the two are inseparable, the court could order that transfusions be given to the mother.[75]

Jefferson v. Griffin Spalding County Hospital Authority[76] took the holding in *Raleigh Fitkin* even further. The court ordered a woman, contrary to her religious beliefs, to submit not only to a blood transfusion, but also to a Caesarean section.[77] In order to enforce its order, the court granted custody of the fetus to the Georgia Department of Human Resources.[78] In doing so the court overrode the mother's freedom of religion, her right to bodily integrity, and her right as a competent parent to autonomy in family matters.[79] The balancing test which the court used was not fully explained and leaves little to aid future decision-makers:

> The Court finds that the state has an interest in the life of this unborn, living human being. The court finds that the in-

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[68]*Id.* at 155.
[69]*Id.* at 159.
[70]*Id.* at 163-64.
[71]*Id.* at 163-65.
[72]42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1964).
[73]*Id.* at 423, 201 A.2d at 537-38.
[74]*Id.* at 423, 201 A.2d at 538.
[75]*Id.*
[76]247 Ga. 86, 274 S.E.2d 457 (1981).
[77]*Id.* at 89, 274 S.E.2d at 458, 460.
[78]*Id.* at 88, 274 S.E.2d at 459.
[79]*See* Finamore, *Jefferson v. Griffin Spalding County Hospital Authority: Court-Ordered Surgery to Protect the Life of an Unborn Child*, 9 AM. J. LAW AND MED. 83 (1983); *see also* Note, *Court-Ordered Surgery for the Protection of a Viable Fetus*, 5 W. NEW ENG. L.REV. 125 (1982).

trusion involved into the life of Jessie Mae Jefferson and her husband, John W. Jefferson, is outweighed by the duty of the state to protect a living, unborn human being from meeting his or her death before being given the opportunity to live.[80]

IV. Factors for Consideration

"To be a therapist to a dying patient makes us aware of the uniqueness of each individual in this vast sea of humanity." Elisabeth Kubler-Ross, *On Death and Dying*, 276 (1969).

A. Viability

Fetal viability is an important issue in any discussion of fetal rights. The Court in *Roe* stated that fetal viability is the decisive point at which a woman's right to choose to have an abortion may be overridden by the state interest in the potential life of the fetus.[81] The Court has since defined viability as the point, according to the judgment of the attending physician, where there is a "reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support."[82] This definition creates a fluid interpretation of this crucial point. It is dependent on advancements in neonatal technology as well as unbiased opinions by physicians.[83]

Although the Court in *Roe* addresses only the woman's right of privacy as it is manifested by her right to choose to have an abortion, the issue of viability has carried over to other contexts. The Supreme Court of Georgia relied on *Roe*'s viability criteria as a basis for its decision in *Jefferson*. "A viable unborn child has the right under the U.S. Constitution to the protection of the state through such statutes prohibiting the arbitrary termination of the life of an unborn fetus."[84] On the other hand, the Supreme Court of Massachusetts did not find

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[80]*Jefferson*, 274 Ga. at 89, 274 S.E.2d at 460 (quoting order issued by lower court).

[81]410 U.S. at 164-65.

[82]Colautti v. Franklin, 439 U.S. 379, 388 (1979).

[83]*See* Comment, *Fetal Viability and Individual Autonomy Resolving Medical and Legal Standards for Abortion*, 27 U.C.L.A. L. Rev. 1340 (1980). This comment examines the difficulties involved in a changing definition of viability as well as the problems of a definition of viability that includes extraordinary artificial means. For example, since medical technology is increasing the ability to sustain fetal life at earlier stages, the article questions who will take on the financial burdens of long-term, neo-natal medical care if the mother does not want the child.

[84]*Jefferson*, 247 Ga. at 88, 274 S.E.2d at 458 (quoting order issued by lower court). It is ironic that the Georgia court cites as authority the very decision which establishes that a fetus is not a "person" under the Constitution and therefore not entitled to its protection. *See* Roe v. Wade, 410 U.S. 113, 158 (1973).

a state interest which was sufficient to force a pregnant woman to submit to a "purse string" operation which would allow her to carry her non-viable fetus to term.[85] The Court stated that "[n]o case has been cited to us, nor have we found one, in which a court ordered a pregnant woman to submit to a surgical procedure in order to assist carrying a child not then viable to term."[86]

Viability is a convenient point at which to balance a woman's fundamental right to choose to procreate against a moral interest in a developing fetus. There are stronger emotions tied to a fetus that more closely resembles a fully developed child. Also, a fetus that can sustain life outside the womb is felt to be more independent of the mother. A decision by a court in the situation of a terminal pregnant woman wishing to die will undoubtedly take viability into account. However, *Roe* does not mandate the use of viability as the deciding factor. The decision states, "If the state is interested in protecting fetal life after viability, *it may go so far as* to proscribe abortion during that period. . . ."[87] A court may decide that violating the woman's right to refuse life-sustaining treatment is a lesser or greater violation than forbidding an abortion. It may be found that the fetus should be protected from its mother's decision to die irrespective of its point of development. On the other hand, it may be found that the woman's rights are superior to the fetus' regardless of its viability. It would be unwise for a court to look only to the stage of fetal development in weighing these two important interests.

B. *Maternal Condition*

An important consideration for the court must be the physical condition of the mother. Although there is a broad range of terminal states, the possibilities may be broken into three catagories which are the chronic vegetative state, terminal but cognizant, and brain dead. Each of these should be approached differently by a decision-maker.

1. Chronic Vegetative—The chronic vegetative state has been defined as a "chronic condition that sometimes emerges after severe brain injury and consists of a return of wakefulness accompanied by an apparent total lack of cognitive function."[88] In this condition the sapient functions of the brain are inoperative. What remains are the vegetative functions, which are those that control body temperature, breathing, blood pressure, heart rate, chewing, swallowing, sleeping and waking.[89]

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[85]Taft v. Taft, 388 Mass. 331, 334, 446 N.E.2d 395, 397 (1983).

[86]*Id.* n.4.

[87]410 U.S. at 164-65 (emphasis added).

[88]*Maternal Vegetative State*, *supra* note 2 at 470.

[89]*In re* Quinlin, 70 N.J. 10, 24, 355 A.2d 647, 654 (1976) (testimony of Dr. Fred Plum).

This was Karen Ann Quinlin's condition at the time her father requested to withdraw the use of a respirator.[90]

A patient in this persistent vegetative state can survive for long periods of time. One woman has survived in this condition for over twenty years.[91] However, recovery with return of cognitive functions is rare.[92] If a pregnant woman is in this state, her developing fetus is not necessarily affected adversely.[93] If proper nutrition is maintained and infection is avoided, a fetus may develop normally despite mechanical maintenance of maternal bodily functions at an early gestational age.[94] Although the fetus may be successfully delivered at twenty-eight weeks, some physicians believe that the best environment for fetal development is the mother's womb.[95]

In many states, a person is considered legally dead if his brain is no longer functioning.[96] The patient who is in a chronic vegetative state does not fulfill the requirements of brain death. The portions of the brain which control vegetative functions are still operative. The patient is still "alive," and he still retains his right of privacy and right of bodily integrity. Since the patient is unable to communicate, these rights have been invoked by guardians in most cases. This allows discontinuance of life support so as to avoid prolonged existence in this state.[97] Nevertheless, it can be argued that this manner of "life" with no awareness of the environment, degrading maintenance by mechanical means, and no hope of recovery is not life at all. Today, in most circumstances,

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[90]*Id.*

[91]2 GREAY & GORDY, ATTORNEYS' TEXTBOOK OF MEDICINE § 29A.71 (1986).

[92]*Id.*

[93]Heikkinen, Rinne, Alahuhta, Lumme, Koivisto, Kirkinen, Sotaniemi, Nuutinen, Jaruinen, *Life Support for 10 Weeks with Successful Fetal Outcome After Fatal Maternal Brain Damage* 290 BRIT. MED. J. 1237, 1238 (April 1985) [hereinafter cited as *Life Support*].

[94]Aderet, Cohen, Abramowicz, Becker, Sazbon, *Traumatic Coma During Pregnancy with Persistent Vegetative State*, 91 BRIT. J. OB. & GYN., 939, 940 (Sept. 1984). In this situation, the fetus developed normally in a comatose mother from 17 weeks gestation and was successfully delivered at 34 weeks despite anemia, hypozia, and treatment with numerous medications. *See also Maternal Vegetative State*, *supra* note 2, at 470. A male infant was successfully delivered by cesarean although the mother was in a chronic vegetative state from 14 weeks gestation. *Life Support*, *supra* note 93.

[95]*Maternal Vegetative State*, *supra* note 2, at 471-72.

> [I]f the mother's condition is stable, as in the chronic vegetative state, the intrauterine environment could well be safer than an incubator for maturation and development. . . . Although the decision about the optimal time for delivery may be dictated by the maternal condition, elective delivery might best be performed at a gestational age of 32 to 34 weeks.

Id., 471-72.

[96]*See infra* note 115 and accompanying text.

[97]*See supra* note 35.

if the patient has clearly expressed verbally or in writing[98] a desire to avoid extraordinary treatment if in this condition, or if the patient's guardian makes a substituted judgment for the patient,[99] he will be allowed to die with no extraordinary measures taken to prevent it.

This may not be the case if the patient is pregnant. The court will have to weigh the invasion of the mother's right to privacy against the state interest in the survival of the fetus. As previously noted, a previable fetus may be successfully carried by a comatose woman through a complete gestation period.[100] Even a viable fetus has a better chance for survival if kept in the womb to develop.[101] This increased, or at times sole, chance of survival may outweigh the burden imposed on the mother. First, the arguments presented by the Supreme Court in *Roe* for not requiring a woman to carry a fetus to term are not present in this instance.[102] The woman has lost cognitive functions. Because she is unable to think, she cannot be disturbed by maternity, or unwed motherhood. It may also be assumed that since the woman did not elect to abort the fetus prior to the onset of her coma, she intended to give birth to the child. Unless she gave explicit instructions to remove life-support regardless of whether she was pregnant, allowing the fetus to fully develop may fulfill the mother's desires.[103]

Second, the arguments for allowing the mother to die while in a persistent vegetative state may be less persuasive than those posed if she were in a cognitive state. Although it is not known if there is any physical pain, the supposition of pain is usually not the reason offered for rejecting treatment. The comatose patient is allowed to die rather than being subjected to constant treatment giving no hope of meaningful life. It also eases the emotional and economic burdens of the family who must watch a loved one linger in a mechanically maintained half-existence. It does not seem so great a burden to require that the mother be maintained for a matter of weeks, or at most nine months, to ensure the life of the fetus. The successful nurturing of the fetus may even

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[98]*See infra* notes 127, 128 and accompanying text. *See also* Bartling v. Superior Court, 163 Cal. App. 3d 186, 198, 209 Cal. Rptr. 220, 226 (1984); John F. Kennedy Memorial Hosp., Inc. v. Bludsworth, 452 So. 2d 921, 926 (1984); *In re* Storar, 52 N.Y.2d 363, 378-80, 420 N.E.2d 64, 72, 438 N.Y.S.2d 266, 274 (1981), *cert. denied sub nom.* Storar v. Storar, 454 U.S. 858 (1981).

[99]*See, e.g.*, *In re* Quinlin 70 N.J. 10, 54, 55, 355 A.2d 647, 671, 672 (1976); Superintendent of Belchertown State School v. Siakewicz, 373 Mass. 728, 745-752, 370 N.E.2d 417, 427-31 (1976).

[100]*See supra* notes 93, 94 and accompanying text.

[101]*See infra* note 113 and accompanying text.

[102]410 U.S. 133, 153 (1973) (factors include stressful life, mental and physical harm of child care, and stigma of unwed motherhood).

[103]*See supra* notes 95-97 and accompanying text.

give some meaning to her existence. Once delivery is completed, the mother may be allowed to die naturally.

2. Terminally Ill and Cognizant—The decision may be different if the patient is terminally ill and fully cognizant. Prior to viability, the woman's right to choose to carry the fetus to term is paramount.[104] Because she is capable of making her decision known, the mother may request a legal abortion, evading the conflict. This is simply an application of the Supreme Court's decision in *Roe*.[105] After viability, the decision again becomes one of balancing interests. The treatment of a number of diseases can continue without adversely affecting the fetus.[106] Therefore, it may be in the best interest of the fetus to keep the mother alive long enough to improve its chances for survival.[107]

Nevertheless, the state's intrusion into the life of the mother may be greater than the state interest in the life of the fetus, because the woman is aware of the pain she is experiencing. She must live with this and the knowledge that attempts to keep her alive for much longer will be futile. If she has made a rational decision to withdraw permission for life-sustaining treatment, the court should respect that decision. The court may, however, on the basis of *Raleigh Fitkin*, order that the fetus be delivered by cesarean section or that labor be induced so as to give it some chance to live.[108]

The court may take a dim view of allowing the mother to withdraw necessary treatment if the burden on her is not so great. If she is not in pain and only hastening an inevitable death, her need is not as critical. In this case a decision should be made to continue treatment long enough to safely deliver the fetus.

3. Brain Dead—In the case of a pregnant woman who is brain dead, new dilemmas may become manifest. If a patient is brain dead,[109]

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[104]410 U.S. at 164.

[105]*Id.*

[106]*See, e.g.*, Banks, *Pregnancy and Lymphoma*, 109 ARCHIVES PATHOLOGY LABORATORY MED. 802 (1985); Deitch, Rightmire, Clothier, & Blass, *Management of Burns in Pregnant Women*, 161 SURGERY, GYN. & OB. 1 (1985); Iochim, *supra* note 3.

[107]*See supra* note 82. "Improved life support with modern techniques has increased the possibility of prolonging pregnancy in a mother with acute fatal illness. Sometimes one or two weeks' life support is enough for the fetus to survive." *Life Support*, *supra* note 93 at 1237.

[108]*See supra* notes 59-67 and accompanying text.

[109]An often used set of criteria for brain death was established in the *Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death*. The report listed three points to be considered in diagnosing death. They are: (1) Unreceptivity and Unresponsivity; (2) No Movement or Breathing, and (3) No Reflexes. The diagnosis should then be confirmed by a flat electroencephalogram. *A Definition of Irreversible Coma: Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death*, 205 J.A.M.A. 85, 86 (1968).

somatic life[110] may be reasonably maintained for only up to two weeks.[111] That is, the cells of the body will begin to deteriorate to the point where attempts to maintain essential bodily functions are useless. The mother's body will begin to harm the fetus. Therefore, the body of a woman who is brain dead may only be used to sustain her fetus for approximately two weeks.[112] This two week span may be sufficient to favorably alter the chances of survival for the fetus. A study done at hospitals in Buffalo, New York, showed that a fetus at 25 weeks has a 38% chance of survival. At 26 weeks it has a 61% chance of survival. At 27 weeks the chances of successful fetal outcome grow to 76%.[113] The authors of the study stated, however, "Attempts to prolong maternal life in the face of brain death are expensive, frustrating and ultimately futile."[114]

That a woman is brain dead may have greater legal significance than medical. A majority of states have accepted by statute a brain oriented method of determining death.[115] In these states, therefore, the patient whose normal brain functions have ceased is legally dead. The

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[110]Meaning that which pertains to the body. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER (1986).

[111]*Maternal Vegetative State*, *supra* note 2, at 471.

[112]*Id.*

[113]Dillon, Lee, Tronolone, Buckwald, & Foote, *Life Support and Maternal Brain Death During Pregnancy*, 248 J.A.M.A. 1089, 1091 (1982) [hereinafter cited as Dillon].

[114]*Id.* Dillon advocates in the case of a "pregnancy complicated by maternal brain death . . . a fetus of 28 weeks or beyond should be delivered as soon as practicable after confirmation of brain death." The authors of the Mayo Clinic Study maintain that a decision to deliver the fetus be based on maternal condition with best outcomes at 32 to 34 weeks. *Maternal Vegetative State*, *supra* note 2, at 472.

[115]ALA. CODE § 22-31-1 (1984); ALASKA STAT. § 9.65.120 (Supp. 1986); ARK. STAT. ANN. § 82-537 (Supp. 1983); CAL. HEALTH & SAFETY CODE § 7180 (West Supp. 1986); COLO. REV. STAT. § 12-36-136 (1985); CONN. GEN. STAT. ANN. § 19a-278 (West Supp. 1986); D.C. CODE ANN. § 6-2401 (Supp. 1986); FLA. STAT. § 382.085 (1986); GA. CODE ANN. § 31-10-16 (Supp. 1986); HAWAII REV. STAT. § 327C-1 (1985); IDAHO CODE § 54-1819 (1979 & Supp. 1986); ILL. REV. STAT. ch. 110 1/2, § 302 (1983); IND. CODE ANN. § 1-1-4-3 (West Supp. 1986); IOWA CODE ANN. § 702.8 (West 1979); KAN. STAT. ANN. § 77-205 (1984); LA. REV. STAT. ANN. § 9.111 (West Supp. 1987); ME. REV. STAT. ANN. tit. 22 § 2811 (Supp. 1986); MD. [HEALTH-GENERAL] CODE ANN. § 5-202 (Supp. 1986); MICH. STAT. ANN. § 333.1021 (Callaghan 1980); MISS. CODE ANN. § 41-36-3 (1972); MO. ANN. STAT. § 194-005 (1983); MONT. CODE ANN. § 50-22-101 (1985); NEV. REV. STAT. § 451.007 (1985); N.H. REV. STAT. ANN. § 141-D:2 (Supp. 1986); N.M. STAT. ANN. § 12-2-4 (1978); N.C. GEN. STAT. § 90-323 (1985); OHIO REV. CODE ANN. § 2108.30 (Supp. 1985); OKLA. STAT. ANN. tit. 63, §§ 3121-23 (West Supp. 1987); OR. REV. STAT. § 146.001 (1984); 35 PA. CONS. STAT. § 10203 (Supp. 1986); S.C. CODE ANN. § 44-43 460 (1985); TENN. CODE ANN. § 68-3-501 (1983); TEX. REV. CIV. STAT. ANN. art. 4447T (Vernon Supp. 1987); VT. STAT. ANN. tit. 18, § 5218 (Supp. 1986); VA. CODE § 54-325.7 (1982 & Supp. 1986); W. VA. CODE § 16-19-1(c) (1985); WIS. STAT. ANN. § 146.71 (West 1986); WYO. STAT. § 35-19-101 (Supp. 1986). Also, Massachusetts, Arizona, Washington, Nebraska, New Jersey, and New York have judicially determined brain death standards.

physician is no longer under a moral or legal duty to continue treatment even over the objections of the family.[116]

If a pregnant woman is brain dead, an argument may be posed that her death extinguished her right of privacy. Therefore, there is no need to weigh interests. The life of the fetus is the sole concern. The mother may be kept "alive," that is functioning, even against her prior requests or requests of her next of kin. This argument appears to solve the two pronged dilemma. The life of the fetus is saved and no fundamental rights are violated. However, the legal basis of the decision is faulty.

The legal death of the mother poses a much greater threat to the life of the fetus than does her right of privacy while alive. Once it is recognized that the woman is dead, the issue changes. Then the question is, may the physician use the newly dead, although mechanically maintained, cadaver of the mother as an incubator for her fetus?[117] Even in life or death situations, courts have never demanded that the organs or body of a deceased person be used to benefit another.[118]

The ability to use the body is no longer founded upon the right of privacy or interest in potential fetal life but rather on the state laws concerning organ donation.[119] Every state and the District of Columbia has passed some form of the Uniform Anatomical Gift Act.[120] According to the Uniform Anatomical Gift Act, the use of the body is predicated on the prior written gift of the body by the deceased.[121] If the deceased had not executed an anatomical gift, the family and certain others may do so.[122] If the physician knows that the woman explicitly wished not to make a gift of her body, he may not use the body after her death.[123]

Where there is agreement among the survivors as to the use of the body for the benefit of the fetus, there will be no problem. The physician may postpone pronouncement of death for the one or two weeks necessary. Complications may arise where there is disagreement over whether bodily functions should be maintained.[124] If the next of kin wants treatment to continue until the fetus can be safely delivered, absent

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[116]Schwartz, *supra* note 1, at 431.

[117]Veatch, *Maternal Brain Death: An Ethicist's Thoughts*, 248 J.A.M.A. 1102, 1103 (1982).

[118]*Id.*

[119]*Id.*

[120]Cotton & Sandler, *The Regulation of Organ Procurement and Transplantation in the United States*, 7 J. Leg. Med. 55, 60 (1986).

[121]Unif. Anatomical Gift Act § 2(a), 8A U.L.A. 34 (1968).

[122]*Id.* § 2(b). In order of priority, those who can consent to organ donations are, "The spouse, adult son or daughter, either parent, adult brother or sister a guardian of the person of the decedent at the time of death, and any other person under authorization or obligation to dispose of the body." *Id.*

[123]*Id.* § 2(c).

[124]Veatch, *supra* note 104.

express rejection by the mother prior to death, he can so authorize it. The husband of the woman has first priority in allowing or denying the use of the body.[125] Where the father of the fetus is not the mother's husband, there may be contention. The father would not be able to override the spouse's, or next of kin's wishes without violating express provisions of the statute.[126] Therefore, the final decision in this case will be an interpretation of the statute rather than a balancing test.

V. Natural Death Acts

Not only the courts, but also the legislatures have become involved in assisting those who wish to die with dignity. A number of states have passed statutes which provide a mechanism by which a person may make known his desire not to be kept alive by artificial means if his physical state should become hopeless.[127] The mechanism, often called a living will, provides a means by which guardians can make a decision for incompetent patients with guidance and security. It allows the patient peace of mind that his wishes will be carried out even though he should become physically unable to assert his desires.[128]

Some Natural Death Acts explicitly state that the authority granted by the patient to withhold life-sustaining procedures is suspended while

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[125]Unif. Anatomical Gift Act § 2(b), 8A U.L.A. 34 (1968).

[126]*Id.*

[127]Ala. Code §§ 22-8A-1 to 10 (1984); Ariz. Rev. Stat. Ann. §§ 36-3201 to 3210 (1986); Ark. Stat. Ann. §§ 82-3801 to 3804 (Supp. 1983); Cal. Health & Safety Code §§ 7185-7195 (West Supp. 1986); 1986 Conn. Acts 85-606 (Reg. Sess.); Colo. Rev. Stat. § 15-18-101 to 113 (Supp. 1986); Del. Code Ann. tit. 16, §§ 2501-2509 (1983); D.C. Code Ann. §§ 6-2421 to 2430 (Supp. 1986); Fla. Stat. Ann. §§ 765.01-15 (West 1986); Ga. Code Ann. §§ 88-4101 to 4112 (1986); Idaho Code §§ 39-4501 to 4508 (1985 & Supp. 1986); Ill. Ann. Stat. ch. 110 1/2, §§ 701-710 (Smith-Hurd Supp. 1986); Ind. Code Ann. §§ 16-8-11-1 to 22 (West Supp. 1986); Iowa Code Ann. §§ 144A.1 to .11 (West Supp. 1986); Kan. Stat. Ann. §§ 65-28, 101 to 109 (1984); La. Rev. Stat. Ann. §§ 40:1299.58.1 - 1299.58.10 (West Supp. 1987); Me. Rev. Stat. Ann. tit. 22 §§ 2921-2931 (Supp. 1986); Md. Health-General Code Ann. §§ 5-601 to 5-614 (Supp. 1986); Miss. Code Ann §§ 41-41-101 to 41-41-121 (Supp. 1986); Mo. Ann. Stat. §§ 459.010 - 459.055 (Vernon Supp. 1986); Mont. Code Ann. §§ 449.540 - 449.690 (1985); N.H. Rev. Stat. Ann. §§ 137-H:1 to 137-H:16 (Supp. 1986); N.M. Stat. Ann. §§ 24-7-1 to 24-7-10 (1986); N.C. Gen. Stat. §§ 90-320 to 90-323 (1985); Okla. Stat. Ann. tit. 63, §§ 3101-3111 (West Supp. 1986); Or. Rev. Stat. §§ 97.050 - 97.090 (1983); Tenn. Code Ann. §§ 32-11-101 to 32-11-110 (Supp. 1985); Tex. Rev. Civ. Stat. Ann. art. 4590h §§ 1-11 (Vernon Supp. 1986); Utah Code Ann. §§ 75-2-1101 to 75-2-118 (Supp. 1985); Vt. Stat. Ann. tit. 18, §§ 5251-5262 (Supp. 1985); Va. Code §§ 54-325.8:1 to 54-325.8:12 (Supp. 1986); Wash. Rev. Code Ann. §§ 70.122.010 - 70.122.905 (Supp. 1987); W. Va. Code §§ 16-30-1 to 16-30-10 (1985); Wis. Stat. Ann. §§ 154.01-154.15 (West Supp. 1986); Wyo. Stat. §§ 35-22-101 to -109 (Supp. 1987).

[128]*See generally* Bryan, *supra* note 1; Hallagan, *Natural Death Acts and Right to Die Legislation*, 1986 Med. Trial Tech. Q. 301, 309; *The "Living Will": The Right to Die with Dignity?*, 26 Case W. Res. L. Rev. 485 (1977).

the patient is pregnant.[129] In these states, therefore, the question of whether a pregnant woman has the right to have procedures withheld has been decided by the legislature. It is interesting to note that with two exceptions,[130] this legislative solution, unlike the judicial decision in *Roe*, makes no qualifications as to viability or stage of pregnancy. The declarations are unenforceable at any time during the pregnancy. Only the statutes in Colorado and Iowa take viability into account. The Colorado Code requires that "a medical evaluation shall be made as to whether the fetus is viable and could with a reasonable degree of medical certainty develop to live birth with continued application of life-sustaining procedures. If such is the case, the declaration shall be given no force or effect."[131]

However, in *Dinino v. State ex rel Gorton*,[132] a woman brought suit seeking a declaration that her directive is valid and enforceable. The directive, as she had written it, varied from the standard set forth in the Natural Death Act in that it required that if she were to become terminally ill at a time when she was pregnant, an abortion was to be performed and subsequently, life-support was to be discontinued.[133] Although the case was not decided on its merit for lack of justiciable controversy,[134] the State in its brief and at oral argument "conceded that an individual can draft a directive that contains a properly worded abortion provision, or in the alternative, simply delete the pregnancy provision in the model directive."[135]

This assertion by the State would appear to undermine the legislative directive if the provision is seen as protection for the fetus. If the pregnancy provision is protection for the woman who wants to be assured that her life will continue until her fetus is safely delivered, the directive and the State's views are in line. If the woman wants to have the option of deleting the provision, or adding a valid abortion consent, then her wishes could be carried out. The woman who wished the child to be carried to term would rest easily just as would the woman who wanted to be assured of her right to die regardless of her pregnant state.

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[129]*See* statutes listed *supra* note 127 for Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maryland, Mississippi, Missouri, Nevada, New Hampshire, Oklahoma, Texas, Utah, Washington, and Wisconsin.

[130]COLO. REV. STAT. § 1518-101-104 (Supp. 1986); IOWA CODE ANN. § 144A.6 (West Supp. 1986).

[131]COLO. REV. STAT. § 1518-101-104 (Supp. 1986). The Iowa statute states basically the same idea.

[132]102 Wash. 2d 327, 684 P.2d 1297 (1984).

[133]*Id.* at 1299.

[134]The plaintiff was neither pregnant nor diagnosed as terminally ill. *Id.*

[135]*Id.* at 1300.

VI. Conclusion

Today's technologies have altered our patterns of birth and death. Life is being extended, for better or worse, at both ends of the spectrum. When a woman is dying yet carrying a child the request to be allowed to die creates serious problems. A balancing test must be performed in order to determine whether or not a pregnant woman or her guardian has the right to order the withdrawal of life-sustaining procedures. The outcome of this test has grave consequences for the mother, her fetus, and her family.

There are several factors which should be considered by a decision-maker in determining the extent of the woman's right to determine what procedures may be performed to sustain her life. A factor which repeatedly has been weighed against the right to die is the integrity of medical ethics. Since the attending physician views a woman and her fetus as two patients, it may violate his ethics to allow them both to die. A factor of greater legal importance is viability. The Supreme Court's *Roe v. Wade* decision established that the state interest in fetal life may override a woman's right to choose to end her pregnancy at this point.[136] Although this ruling does not mandate the use of viability as the cut-off point for all of a mother's rights, it will certainly be an important consideration.

Also important in the decision is the physical condition of the mother. The decision whether to mandate the use of life-sustaining measures on a comatose woman may be resolved differently if a woman is aware of her condition and is requesting death. If a woman is brain-dead, the medical procedures only sustain a cadaver. Therefore, use of the body depends upon compliance with the state's anatomical gift act.

Some states have adopted living-will statutes. In some of these jurisdictions the statutes preclude use of these directives while the woman is pregnant. In these states, the woman's right to die may depend upon whether the statutes forbid the use of a living-will or only suggest that they not be used during pregnancy.

No hard and fast rule may be made about a woman's right to die or a fetus' right to be born. There are too many variables to create one single standard. One hopes the relevant factors will be weighed in each case to determine the best overall solution.

Kristin A. Mulholland

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[136]410 U.S. 113 (1976).

Surrogate Motherhood Legislation: A Sensible Starting Point

I. Introduction

Fifteen to twenty percent of the married couples in the United States have infertility problems.[1] Traditionally, those couples with infertility problems could establish a family only by adopting a child. However, due to the growing demand and decreasing supply of adoptable babies, adoption now involves a long waiting period for the adopting parents.[2]

New reproductive technologies provide many infertile couples with other options. When the husband of a married couple is infertile, the wife may be artificially inseminated by sperm from a sperm bank. When the wife of a married couple is infertile, sperm from the husband may be used to artificially inseminate a woman who is capable of conceiving and carrying a child.[3] The latter option is commonly referred to as surrogate motherhood.

Surrogate motherhood is a technological solution to infertility, but its legal status remains uncertain. Because it is a practice not contemplated by existing state and federal laws, surrogate motherhood currently exists in legal limbo.

The legal issues and conflicts regarding surrogate motherhood have been identified and debated. There is now an urgent need for state legislatures to respond to the debate by enacting laws clarifying the legality of surrogate motherhood. Proposals have been offered in many legislatures but no proposal has been enacted in any jurisdiction.[4]

The purpose of this Note is to present the legal issues and conflicts regarding surrogate motherhood, to discuss the attempts of legislators to resolve those issues and conflicts, and to propose principled legislation to legalize and regulate the practice of surrogate motherhood.

II. Legal Issues

The state's ability to regulate or prohibit surrogate motherhood depends upon the state interests at stake and whether or not the practice is protected by the federal constitution.

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[1]L.A. Daily J., May 21, 1982, at 2, col. 2. *See also* Annas, *Fathers Anonymous: Beyond the Best Interest of the Sperm Donor*, Child Welfare, March 1981, at 164.

[2]Parker, *Surrogate Motherhood, Psychiatric Screening and Informed Consent, Baby Selling, and Public Policy*, 12 Bull. of Am. Acad. of Psychiatry & L. 21 (1984).

[3]A third possibility is that a viable sperm may fertilize a viable egg outside of a woman's body (*in vitro* fertilization). The resulting conceptus may then be implanted in the uterus of a woman who is capable of carrying the child.

[4]*See infra* note 60.

A. Constitutional Right To Privacy

The United States Supreme Court has recognized procreative freedom as a fundamental right that falls within the broader constitutionally protected right to privacy.[5] Proponents of surrogate motherhood argue that the practice falls within this constitutionally protected area and, therefore, cannot be prohibited by the state.

The right to privacy was first applied to the marital relationship in *Griswold v. Connecticut*.[6] In *Griswold*, the Supreme Court invalidated a Connecticut statute that forbade the use of contraceptives. In its opinion, the Court identified various "zones of privacy"[7] guaranteed by the Constitution,[8] and stated that marriage "deal[t] with a right of privacy older than the Bill of Rights. . . ."[9] Therefore, the state could not achieve its goals by means that would be destructive to the marriage relationship.[10]

The scope of constitutional protection of procreation was defined in cases following *Griswold*. In *Eisenstadt v. Baird*,[11] the Court expanded the scope of procreative freedom to include unmarried individuals. At issue in *Eisenstadt* was a Massachusetts statute that made distribution of contraceptives to unmarried individuals a criminal offense. In finding the Massachusetts statute unconstitutional, the Court stated, "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[12]

Further expansion of the scope of constitutional protection came in *Roe v. Wade*,[13] where the Court held that a woman's decision to abort

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[5]*See infra* notes 6-19.

[6]381 U.S. 479 (1965).

[7]*Id.* at 484.

[8]Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

381 U.S. at 484.

[9]381 U.S. at 486.

[10]*Id.* at 485.

[11]405 U.S. 438 (1972).

[12]*Id.* at 453.

[13]410 U.S. 113 (1973).

a pregnancy was within the right to privacy.[14] Therefore, the right to privacy encompassed both the decision to become pregnant and the decision to terminate that pregnancy. However, the Court noted that the right to personal privacy was not absolute and that the state could still regulate the right upon showing a "compelling state interest".[15] When a "compelling state interest" was shown, the standard for state regulation was the least restrictive means possible, which meant that the state could not impose regulations broader than necessary to protect its own "compelling interest".[16]

The state's limited ability to intervene into matters of procreative freedom was further explained in *Carey v. Population Services International.*[17] In invalidating a New York statute restricting the sale, distribution and advertising of contraceptives, the Court stated that the outer bounds of the right of privacy have not been determined.[18] The Court explained that an individual's right to make decisions involving procreation is not protected from all governmental intrusions; rather, it is protected from unjustified governmental intrusions.[19]

The relation of these cases to surrogate motherhood has been explained by professor John Robertson of the University of Texas at Austin:

> The principle underlying these holdings [referring to the line of cases from *Griswold* through *Roe v. Wade*] includes the right of a married couple to have children coitally. If so, it is difficult to see how noncoital, collaborative reproduction by married persons can be treated differently. If married persons have a right to have and raise children, it should follow that they have the right to enlist the support of physicians and others to obtain reproductive factors (sperm, eggs or uterus) that will enable them to do so.[20]

Professor Robertson's argument is forceful, but how far does the right extend? Does it extend to paying the surrogate mother a fee for her role as a surrogate mother? A circuit court in Michigan addressed this question in *Doe v. Kelley.*[21] The plaintiffs in *Doe v. Kelley* were an infertile couple, John and Mary Doe, and a surrogate mother, Mary

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[14]*Id.* at 155.

[15]*Id.* (quoting Kramer v. Union Free School District, 395 U.S. 621, 627 (1969)).

[16]410 U.S. at 155.

[17]431 U.S. 678 (1977).

[18]*Id.* at 684.

[19]*Id.* at 687.

[20]Billig, *High Tech Earth Mothering*, 9 District Lawyer 56, 57 (1985).

[21]6 Fam. L. Rep. (BNA) 3011 (Cir. Ct. Mich. 1980), *aff'd*, 106 Mich. App. 169, 307 N.W.2d 438 (1981).

Roe. The surrogate mother had agreed to an arrangement whereby she and John Doe would conceive a child through artificial insemination. Upon birth of the child, Mary Roe would relinquish the child to John and Mary Doe for adoption. Mary Roe would receive medical expenses and a payment of five thousand dollars from the Does for her part in the arrangement.

The plaintiffs alleged that the Michigan adoption statute prohibiting the payment of fees (other than court approved fees) in connection with an adoption infringed upon their right to privacy.[22] The court held that the Michigan statute did not infringe upon the plaintiffs' right to privacy.[23] The court explained that

> [t]he right to adopt a child based upon the payment of five thousand dollars is not a fundamental personal right and reasonable regulations controlling adoption proceedings that prohibit the exchange of money (other than charges and fees approved by the court) are not constitutionally infirm.[24]

Even assuming that the plaintiffs' arrangement was within the right to privacy, the state still could interfere because it has a compelling interest in preventing the commercialism of babies. According to the court, the surrogate was at least partly induced to participate in the surrogate arrangement by the payment of the five thousand dollar fee, and such commercialism violated state public policy.[25] Consequently, while use of a surrogate mother *per se* was found to be within the constitutionally protected right to privacy, the state could prohibit payment of a fee to the surrogate. The court considered such a restriction appropriately narrow to protect only the state interest in preventing the commercialism of babies.[26]

B. Fourteenth Amendment Equal Protection

Another constitutional argument raised by proponents of surrogate motherhood is based upon the equal protection mandated by the Fourteenth Amendment. The artificial insemination of women by sperm received from a sperm bank is now widely accepted and twenty-eight states have laws providing that a sperm donor recipient and her husband are the legal parents of a child conceived and born from artificial

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[22]*Id.* at 3012.
[23]*Id.* at 3013.
[24]*Id.*
[25]*Id.* at 3014.
[26]*Id.* at 3013-14.

insemination.[27] These laws were enacted to protect an anonymous donor to a sperm bank from legal responsibility for the child conceived from his sperm.[28] Proponents of surrogate motherhood argue that the absence of an analogous law allowing a natural father and his wife to be the legal parents of a child conceived from the artificial insemination of a surrogate mother (the egg donor) violates the equal protection mandated by the Fourteenth Amendment.[29] This Fourteenth Amendment argument is problematic because the genetic analogy of the sperm-donating anonymous insemination donor to the egg-donating surrogate mother is inaccurate. The role of the sperm donor through a sperm bank is detached and anonymous. However, the role of the surrogate mother is intimate. The surrogate mother carries the child through nine months of gestation. For those nine months the developing fetus is intimately biologically connected to the surrogate. Also, the physiological and psychological

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[27]ALA. CODE § 26-17-21 (1986); ALASKA STAT. § 25.20.045 (1986); ARK. STAT. ANN. § 61-141 (1971); CAL. CIV. CODE § 7005 (West 1983); COLO. REV. STAT. § 19-6-106 (1986); CONN. GEN. STAT. §§ 45-69f (1981); FLA. STAT. ANN. § 742.11 (West 1986); GA. CODE ANN. §§ 74-101.1 (Harrison 1981); IDAHO CODE § 39-5405 (1985); ILL. ANN. STAT. ch. 40, § 1453 (Smith-Hurd 1981); KAN. STAT. ANN. §§ 23-128 to -130 (1981); LA. CIV. CODE ANN. art. 188 (West 1984); MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); MD. GEN. PROV. CODE § 20-214 (1982); MICH. COMP. LAWS ANN. §§ 333.2824, 700.111 (West 1980); MINN. STAT. ANN. § 257.56 (West 1982); MONT. CODE ANN. § 40-6-106 (1985); NEV. REV. STAT. § 126.061 (1985); N.J. STAT. ANN. § 9:17-44 (West 1987); N.Y. DOM. REL. LAW § 73 (Consol 1977); N.C. GEN. STAT. § 49A-1 (1984); OKLA. STAT. ANN. tit. 10, §§ 551-553 (West 1987); OR. REV. STAT. § 109.239, .243, .247 (1983); TEX. FAM. CODE ANN. § 12.03 (Vernon 1986); VA. CODE § 64.1-7.1 (1980); WASH. REV. CODE ANN. § 26.26.050 (1986); WIS. STAT. ANN. § 767.47(9) (West 1981), § 891.40 (1987); WYO. STAT. § 14-2-103 (1986).

[28]Section 5 of the Uniform Parentage Act provides:

> (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.
>
> (b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

UNIF. PARENTAGE ACT § 5, 9A U.L.A. 592-93 (1979). *See also* Billig, *High Tech Earth Mothering*, 9 DISTRICT LAWYER 56, 58 (1985).

[29]Craig v. Boren, 429 U.S. 190, 197 (1976), has settled the standard for review ("[C]lassification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

changes that occur in a woman during pregnancy are unique. Therefore, Fourteenth Amendment support for surrogate motherhood based upon the anonymous insemination donor statutes is doubtful.

C. *Family Integrity*

The right to family integrity is protected by both the United States Constitution and by state laws. On the federal level, the Supreme Court has interpreted the Fourteenth Amendment to the Constitution as protecting family integrity.[30] Because protection for family integrity is rooted in the Constitution, the state must have a "compelling interest"[31] to regulate family matters. The state has a compelling interest in the welfare of children,[32] and the family law statutes are designed to protect children and the integrity of the family. For example, Indiana Code § 31-6-1-1 states that "[i]t is the policy of this state and the purpose of this article . . . to strengthen family life by assisting parents to fulfill their parental obligations,"[33] and Indiana Code § 31-6-6.1-11 provides that in child custody cases "[t]he court shall determine custody in accord with the best interests of the child."[34]

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[30]Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (The Fourteenth Amendment "denotes . . . the right of the individual . . . to marry, establish a home and bring up children."); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40 (1974) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."). *See also* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); May v. Anderson, 345 U.S. 528, 533 (1953).

[31]Roe v. Wade, 410 U.S. 113, 155 (1973).

[32]*In re* Joseph, 416 N.E.2d 857, 860 (Ind. Ct. App. 1981).

[33]IND. CODE § 31-6-1-1 (1982).

[34]IND. CODE § 31-6-6.1-11 (Supp. 1986) provides:

(a) The court shall determine custody in accord with the best interests of the child. In determining the child's best interests, there shall be no presumption favoring either parent. The court shall consider all relevant factors, including:

(1) the age and sex of the child;

(2) the wishes of the child's parents;

(3) the wishes of the child;

(4) the interaction and interrelationship of the child with his parents, and his siblings, and with any other person who may significantly affect the child's best interest;

(5) the child's adjustments to his home, school, and community; and

(6) the mental and physical health of all individuals involved.

(b) The custodial parent may determine the child's upbringing, which includes his education, health care, and religious training, unless the court determines that the best interests of the child require a limitation on his authority.

(c) The court may order the probation department, the county department of public welfare, or any licensed child-placing agency to supervise the placement to insure that the custodial or visitation terms of the decree are carried out if:

Opponents of surrogate motherhood contend that surrogate motherhood psychologically damages children by treating them as commercial objects.[35] Critics also contend that surrogate motherhood destroys the family unit by displacing the child from one of his biological parents.[36]

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(1) both parents or the child request supervision; or

(2) the court finds that without supervision the child's physical health and well-being would be endangered or his emotional development significantly impaired.

(d) The court may interview the child in chambers to ascertain his wishes. The court shall permit counsel to be present at this interview, which must be on the record.

(e) The court may modify an order determining custody rights whenever modification would serve the best interests of the child.

(f) If an individual who has been awarded custody of a child under this section intends to move to a residence (other than a residence specified in the custody order) that is outside Indiana or one hundred (100) miles or more from the individual's county of residence, that individual must file a notice of that intent with the clerk of the court that issued the custody order and send a copy of the notice to each noncustodial parent (as defined in section 12.1 [31-6-6.1-12.1] of this chapter).

IND. CODE § 31-3-1-6 (1982) provides:

(a) Except as otherwise provided in this section, a petition to adopt a child under eighteen [18] years of age may be granted only if written consent to adoption has been executed by:

(1) each living parent of a child born in wedlock;

(2) the mother of a child born out of wedlock and the father of such a child whose paternity has been established by a court proceeding;

(3) any person, agency, or county department of public welfare having lawful custody of the child whose adoption is being sought;

(4) the court having jurisdiction of the custody of the child, if the legal guardian or custodian of the person of the child is not empowered to consent to the adoption;

(5) the child to be adopted, if more than fourteen [14] years of age; or

(6) the spouse of the child to be adopted.

A parent under the age of eighteen [18] years may consent to an adoption without the concurrence of his parent or parents, or the guardian of his person unless the court, in its discretion, determines that it is in the best interest of the child to be adopted to require such a concurrence.

. . . .

(f) A consent to adoption may not be withdrawn after the entry of the decree of adoption. A consent to adoption may not be withdrawn prior to the entry of the decree of adoption unless the court finds, after notice and opportunity to be heard afforded to the petitioner, the person seeking the withdrawal is acting in the best interest of the person sought to be adopted and the court orders the withdrawal.

[35]Bitner, *Womb for Rent: A Call for Pennsylvania Legislation Legalizing and Regulating Surrogate Parenting Agreements*, 90 DICK. L. REV. 227, 235 (1985).

[36]Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1, 17 (1986) ("It is the basic working assumption of our society that children belong with their biological parents whenever possible.").

Conversely, proponents of surrogate motherhood contend that infertile couples who are willing to have children by means of a surrogate mother, despite the potential problems involved, are just as capable of forming and nurturing a strong family unit as any fertile married couple.[37]

D. Baby Selling

The greatest legal obstacle to surrogate motherhood is the state's prohibition of child selling.[38] A natural mother is prohibited from receiving any fee in connection with an adoption or termination of her parental rights.[39] Some property may be transferred in a supervised adoption, such as reasonable attorney's fees, medical expenses, and other court approved fees.[40] Such payments are for the reasonable expenses that are incurred in connection with the adoption process; it is the transfer of additional funds to entice a mother to give up her child for adoption that is prohibited.

The paradigm situation contemplated by the law is where an unwed mother, faced with an unwanted pregnancy, is approached by "baby brokers" who offer her a fee to induce her to give up her child for adoption. Offering a fee to a mother in this situation can be an un-

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[37]Note, *The Surrogate Mother Contract in Indiana*, 15 IND. L. REV. 807, 815 (1982).

[38]*See, e.g.*, IND. CODE § 35-46-1-4 (1982) which provides:

(b) Except for property transferred or received:

(1) under a court order made in connection with a proceeding under I.C. 31-1-11.5 or I.C. 31-6-5; or

(2) under I.C. 35-46-1-9(b); a person who transfers or receives any property in consideration for the termination of the care, custody, or control of a person's dependent child commits child selling, a Class D felony.

(IND. CODE § 31-1-11.5-1 to -26 (Supp. 1986) governs dissolution of marriage. IND. CODE § 31-6-5-1 to -6 (Supp. 1986) governs termination of the parent-child relationship).

[39]*See, e.g.*, IND. CODE § 35-46-1-9 (1982) which provides:

(a) Except as provided in subsection (b), a person who, with respect to an adoption, transfers or receives any property in connection with the waiver of parental rights, the termination of parental rights, the consent to adoption, or the petition for adoption commits profiting from an adoption, a Class D felony.

(b) This section does not apply to the transfer or receipt of:

(1) reasonable attorney's fees;

(2) hospital and medical expenses concerning childbirth and pregnancy incurred by the adopted person's natural mother;

(3) reasonable charges and fees levied by a child placing agency licensed under I.C. 12-3-2 or by a county department of public welfare; or

(4) other charges and fees approved by the court supervising the adoption.

[40]*See, e.g.*, IND. CODE § 35-46-1-9(b) (1982). IND. CODE § 31-6-6.1-17 (1982) provides: The court may order the father to pay reasonable and necessary expenses of the mother's pregnancy and the childbirth, including the cost of prenatal care, delivery, hospitalization, and postnatal care.

conscionable inducement to give up a child, and is therefore prohibited.[41] The primary argument made by opponents of surrogate motherhood is that offering a fee to women to conceive, carry and bear children encourages those women to have children they do not want.[42] Proponents of surrogate motherhood distinguish the surrogate motherhood situation by responding that the surrogate mother is really being paid a fee for her services in assisting the infertile couple in having a child and not for giving up her child for adoption.[43]

Recently, the Supreme Court of Kentucky faced the child selling issue.[44] In a challenge by the attorney general of Kentucky to surrogate motherhood contracts, the court held that surrogate motherhood contracts did not violate Kentucky laws governing child selling.[45] Central to the court's holding was its finding that the surrogate's decision to bear a child was made prior to conception. The court stated:

> The essential considerations for the surrogate mother when she agrees to the surrogate parenting procedures are *not* avoiding the consequences of an unwanted pregnancy for fear of the financial burden of child rearing. On the contrary, the essential consideration is to assist a person or couple who desperately want a child but are unable to conceive one in the customary manner to achieve a biologically related offspring.[46]

While the argument is well made that the surrogate mother is being paid a fee for her services rather than being paid to give up her child for adoption, the fee does necessarily inject some commercialism into the child bearing process.[47]

E. Consent to Adoption

The state's policy governing parental consent to an adoption is connected to the state's interest in preventing baby selling and protecting family integrity. For example, in Indiana, a mother cannot consent to

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[41]Surrogate Parenting v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209, 211 (Ky. 1986); Doe v. Kelley, 6 Fam. L. Rep. (BNA) 3011, 3013 (Cir. Ct. Mich. 1980); Bitner, *supra* note 35, at 235; Note, *supra* note 37, at 814.

[42]6 Fam. L. Rep. (BNA) at 3014; Note, *supra* note 37, at 812.

[43]Bitner, *supra* note 35, at 235.

[44]Surrogate Parenting v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209 (Ky. 1986).

[45]*Id.* at 211.

[46]*Id.* at 211-12.

[47]Katz, *supra* note 36.

an adoption until the child she is carrying is born.[48] The statute is potentially fatal to the surrogate motherhood agreement. The surrogate may, prior to conception, agree to consent to the adoption of her child but may revoke that agreement anytime during the pregnancy because the statute forbids her from validly consenting to the adoption of her child prior to the child's birth.[49] The purpose of the law is to prevent an expectant mother from making a hasty and later regretful decision to give up her child for adoption. However, surrogate motherhood falls outside of this purpose because the surrogate mother decides before becoming pregnant that she will assist an infertile couple to have a child of their own.[50]

F. Legitimacy and Paternity

Finally, the state also has an interest in establishing paternity and the legitimacy of children. The legitimacy issue comes into play when a child is born to an unmarried surrogate mother. Such a child would be illegitimate under present law[51] and would suffer the stigma of being illegitimate. The child's inheritance rights would also be affected.[52] If

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[48]IND. CODE § 31-3-1-6 (1982) provides:

(b) The consent to adoption may be executed at any time after the birth of the child either in the presence of the court, in the presence of a notary public or other person authorized to take acknowledgements, or in the presence of a duly authorized agent of the state or county department of public welfare or licensed child-placing agency.

[49]*Id.*

[50]*See Surrogate Parenting*, 704 S.W.2d at 211-12.

[51]*See* 10 C.J.S. *Bastards* § 1 (1938).

[52]*E.g.*, IND. CODE § 29-1-2-7 (1982) provides:

(a) For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants and collaterals, in all degrees, and they may inherit from him. Such child shall also be treated the same as if he were a legitimate child of his mother for the purpose of determining homestead rights, and the making of family allowances.

(b) For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his father, if but only if, (1) the paternity of such child has been established by law, during the father's lifetime; or (2) if the putative father marries the mother of the child and acknowledges the child to be his own.

The testimony of the mother may be received in evidence to establish such paternity and acknowledgment but no judgment shall be made upon the evidence of the mother alone. The evidence of the mother must be supported by corroborative evidence or circumstances.

When such paternity is established as provided herein such child shall be treated the same as if he were the legitimate child of his father, so that he and his issue shall inherit from his father and from his paternal kindred, both

the child is born to a married surrogate, then present law would presume that the surrogate's husband is the father.[53]

In the case of the unmarried surrogate mother, if all goes as planned in the surrogate motherhood arrangement, then subsequent adoption of the child by the natural father and his wife would solve the legitimacy problem.[54] It is when the unmarried surrogate wants to keep the child that the legitimacy problem arises. If the unmarried surrogate is successful in keeping the child, then the child would be illegitimate.[55]

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descendants and collateral, in all degrees, and they may inherit from him. Such child shall also be treated the same as if he were a legitimate child of his father for the purpose of determining homestead rights, and the making of family allowances.

[53]*E.g.*, IND. CODE § 31-6-6.1-9 (Supp. 1986) provides:

(a) A man is presumed to be a child's biological father if:

(1) he and the child's biological mother are or have been married to each other and the child is born during the marriage or within three hundred (300) days after the marriage is terminated by death, annulment, or dissolution;

(2) he and the child's biological mother attempted to marry each other by a marriage solemnized in apparent compliance with the law, even though the marriage is void under I.C. 31-7-6-2, I.C. 31-7-6-3, I.C. 31-7-6-4, or I.C. 31-7-6-6, or is voidable under I.C. 31-7-7, and the child is born during the attempted marriage or within three hundred (300) days after the attempted marriage is terminated by death, annulment, or dissolution; or

(3) after the child's birth, he and the child's biological mother marry, or attempt to marry, each other by a marriage solemnized in apparent compliance with the law, even though the marriage is void under I.C. 31-7-6-2, I.C. 31-7-6-3, I.C. 31-7-6-4, or I.C. 31-7-6-6, or is voidable under I.C. 31-7-7, and he acknowledged his paternity in writing filed with the registrar of vital statistics of the Indiana State Board of Health or with a local board of health.

(b) If there is no presumed biological father under subsection (a), a man is presumed to be the child's biological father if, with the consent of the child's mother:

(1) he receives the child into his home and openly holds him out as his biological child; or

(2) he acknowledges his paternity in writing with the registrar of vital statistics of the Indiana State Board of Health or with a local board of health.

The presumption of paternity may be rebutted by "direct, clear, and convincing evidence." R.D.S. v. S.L.S., 402 N.E.2d 30, 31 (Ind. Ct. App. 1980).

[54]*E.g.*, IND. CODE § 29-1-2-8 (1982) provides:

For all purposes of intestate succession, including succession by, through or from a person, both lineal and collateral, an adopted child shall be treated as a natural child of his adopting parents; and he shall cease to be treated as a child of his natural parents and of any previous adopting parents: Provided, that if a natural parent of a legitimate or illegitimate child shall have married the adopting parent, the adopted child shall inherit from his natural parent as though he had not been adopted, and from his adoptive parent as though he were the natural child; and Provided further, That if a person who is related to a child within the sixth degree adopts such child, such child shall upon the occasion of each death in his family have the right of inheritance through his natural parents or adopting parents, whichever is greater in value in each case.

[55]*See* 10 C.J.S. *Bastards* § 1 (1938).

In the case of the married surrogate, current law provides a solution to the paternity problem. Paternity of the natural father could be acknowledged in the surrogate motherhood contract and adjudicated before birth of the child.[56]

III. Legislative Proposals

Recently, *In re Baby M*[57] raised national awareness of the problems surrounding surrogate motherhood. *Baby M* involved a surrogate motherhood contract between William Stein, the natural father of "Baby M", and Mary Beth Whitehead, the surrogate mother. The contract obligated the natural father to pay the surrogate a fee of 10,000 dollars plus all medical expenses. In exchange for these payments, the surrogate was obligated to relinquish the newborn child to the natural father and to terminate her parental rights. However, after "Baby M" was born, the surrogate mother refused to relinquish the child and terminate her parental rights. The natural father then sued the surrogate to enforce the surrogate motherhood contract. The case was decided by Judge

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[56]*E.g.*, Ind. Code § 31-6-6.1-2 (Supp. 1986) provides:

(a) A paternity action may be filed by the following persons:

(1) The mother, or expectant mother.

(2) A man alleging that he is the child's biological father, or that he is the expectant father of an unborn child.

(3) The mother and a man alleging that he is her child's biological father, or by the expectant mother and a man alleging that he is the biological father of her unborn child, filing jointly.

(4) A child.

A person under the age of eighteen [18] may file a petition if he is competent except for his age. A person who is otherwise incompetent may file a petition through his guardian, guardian ad litem, or next friend.

(b) The state department of public welfare or a county department of public welfare may file a paternity action if:

(1) the mother;

(2) the person with whom the child resides; or

(3) the director of the county department of public welfare; has executed an assignment of support rights under Title IV-D of the federal Social Security Act (42 U.S.C. 651 et. seq.).

(c) In every case, the child, the child's mother, and any person alleged to be the father are necessary parties to the action.

In Syrkowski v. Appleyard, 8 Fam. L. Rep. (BNA) 2139 (Cir. Ct. Mich. 1981), the plaintiff Syrkowski filed for an order of filiation under the *Michigan Paternity Act* alleging that pursuant to a surrogate motherhood arrangement he was the father of the defendant Appleyard's unborn child. The circuit court held that it had no jurisdiction in the case because the subject matter was beyond the scope of the *Michigan Paternity Act*. *Id.* The Michigan Court of Appeals affirmed the decision, 122 Mich. App. 506, 333 N.W.2d 90, 93-94 (Mich. App. 1983); however, the Michigan Supreme Court reversed and remanded, holding that the plaintiff's request was within the scope of the *Paternity Act*. 420 Mich. 367, 362 N.W.2d 211, 214 (1985).

[57]13 Fam. L. Rep. (BNA) 2001 (Super. Ct. N.J. 1987).

Sorkow of the New Jersey Superior Court in Bergen County. In Judge Sorkow's opinion, surrogate motherhood contracts were not within the current adoption statutes and, therefore, could be specifically enforced.[58] However, the child custody decision was not based upon the surrogate motherhood contract but upon the best interests of the child, and in this case the best interests of the child were served by granting custody to the natural father.[59]

The *Baby M* case highlights the urgent need for a legislative solution to the problems posed by surrogate motherhood. Legislators in many jurisdictions have offered proposals to legalize and regulate the practice of surrogate motherhood,[60] and although the proposed regulations have been aimed at protecting the state interests at stake, none of the proposals have been enacted.[61] The proposals vary in complexity and requirements. The following is a summary of the important features of many of these proposals.

A. Who May Participate

Alaska H.B. Nos. 497 and 498 are, together, the simplest and broadest proposals regulating surrogate motherhood.[62] The proposals

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[58]*Id.* at 2018. Conversely, in a recent adoption case in Indiana, *Miroff v. Surrogate Mother*, a Marion County Superior Court judge ruled that surrogate mother contracts were within the Indiana Adoption Statutes and that the contracts violated those statutes by providing for payments to the surrogate in excess of the allowable medical expenses and attorneys fees. 13 Fam. L. Rep. (BNA) 1260 (Super. Ct. Ind. 1987). The judge also ruled that surrogate motherhood contracts violated "the public policy prohibiting baby-selling." *Id.*

[59]13 Fam. L. Rep. (BNA) at 2026.

[60]H.B. 497, Alaska (1981); H.B. 498, Alaska (1981); Assembly Bill 3771, Cal. (April 6, 1982; amended May 18, 1982; amended June 17, 1982; amended August 2, 1982); Comm. B. 5316, Conn. (1983); H.B. 1009, Haw. (1983); S.B. 361, Kan. (1983); S.B. 485, Kan. (1984); H.B. 1552, Md. (1985); H.B. 1595, Md. (1984); H.B. 4555, Mich. (1985); H.F. 534, Minn. (1983); H.B. 2693, Or. (1983); H.B. 3491, S.C. (1982).

Ala. H.B. 593 (1982) would make surrogate motherhood a class A misdemeanor. Freed and Foster, *Family Law in the Fifty States: An Overview*, 16 FAM. L. Q. 289, 299 (1983).

Ky. H.B. 668 (1986) would amend the Kentucky statute on child selling, KY. REV. STAT. ANN. § 199.590 (Michie 1986), to include the following subsection:

> (3) No person, agency, institution, or intermediary shall be a party to a contract or agreement which would compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination. No person, agency, institution or intermediary shall receive compensation for the facilitation of contracts or agreements as proscribed by this subsection. Contracts or agreements entered into in violation of this subsection are void.

The Kentucky proposal did not reach the floor of the General Assembly.

[61]"Currently, legislatures in at least 13 states (California, Connecticut, Delaware, Iowa, Maine, Massachusetts, Missouri, Nebraska, New Jersey, New York, Oregon, Pennsylvania, and Rhode Island) and the District of Columbia have bills pending that relate to surrogate parenthood." 13 Fam. L. Rep. (BNA) at 1260.

[62]H.B. 497, Alaska (1981); H.B. 498, Alaska (1981).

simply permit the enforceability of surrogate motherhood contracts without further elaboration.[63] Seven states' proposals require the natural father (artificial insemination donor) to be married,[64] and two of those proposals require that the natural father and his wife be an infertile couple.[65] Four states' legislative proposals allow a single natural father to participate in a surrogate motherhood arrangement.[66]

Some proposals do not specify an age requirement for the participants.[67] When specified, the age requirements for a surrogate mother[68] and the natural father[69] are eighteen years of age or older. One proposal does require the surrogate to be at least twenty-one years old.[70]

B. Physical and Psychological Examination; Investigation of the Home

Nearly every proposal requires that the surrogate mother and natural father submit to physical examination and genetic screening.[71] These examinations are required to evaluate the capacity of the natural father and the surrogate to produce a normal, healthy child, free of genetic defects.[72] The surrogate is also required to undergo psychological eval-

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[63]*Id.*

[64]Assembly Bill 3771 §§ 7501, 7502(a), Cal. (amended Aug. 2, 1982); S.B. 361 §§ 1, 6(a)(1), Kan. (1983); S.B. 485 § 1, Kan. (1984); H.B. 1552 § 5-209(1), Md. (1985); H.B. 1595 § 5-209(A), Md. (1984); H.B. 4555 § 2(b), Mich. (1985); H.B. 3491 §§ 20-7-3640(B)(5), (B)(7), 29-7-3680(C), S.C. (1982).

[65]Assembly Bill 3771 §§ 7501, 7502(a), Cal. (amended Aug. 2, 1982); H.B. 4555 § 4(1)(e), Mich. (1985).

[66]Comm. B. 5316 § 8(a), Conn. (1983); H.B. 1009 § 9(a)(13), (19), Haw. (1983); H.F. 534 § 4, Minn. (1983); H.B. 2693 § 5(3), Or. (1983).

[67]H.B. 497, Alaska (1981); H.B. 498, Alaska (1981); H.B. 4555, Mich. (1985); H.F. 534, Minn. (1983).

[68]Assembly Bill 3771 § 7505(b)(6), Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 1(3), Conn. (1983); H.B. 1009 § 1(8), Haw. (1983); S.B. 485 § 5(a)(3), Kan. (1984); H.B. 1552 § 5-209(2), Md. (1985); H.B. 1595 § 5-209(B), Md. (1984); H.B. 2693 § 5(2), Or. (1983); H.B. 3491 § 20-7-3620(F), S.C. (1982). California Assembly Bill 3771 § 7505(d)(7) (amended May 18, 1982) required the surrogate to be at least twenty-one years of age, but the proposal was later amended on Aug. 2, 1982 requiring the surrogate to be at least eighteen years of age.

[69]Comm. B. 6316 § 1(2), Conn. (1983); H.B. 1009 § 1(5), Haw. (1983); H.B. 1552 § 5-209(1), Md. (1985); H.B. 1595 § 5-209(A), Md. (1984); H.B. 2693 § 5(1), Or. (1983); H.B. 3491 § 20-7-3620(E), S.C. (1982). The South Carolina proposal also requires the natural father's wife to be at least eighteen years of age. H.B. 3491 § 20-7-3620(H), S.C. (1982).

[70]S.B. 361 § 5(a)(6), Kan. (1983).

[71]Assembly Bill 3771 § 7506(b), Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 3(10), (13), Conn. (1983); H.B. 1009 § 9(10), (14), Haw. (1983); S.B. 361 § 4(a)(3) (required of the surrogate only), Kan. (1983); S.B. 485 § 4(a)(1) (required of the surrogate only), Kan. (1984); H.B. 1552 § 5-216(6), (8), Md. (1985); H.B. 1595 § 5-216(6), (8), Md. (1984); H.F. 534 § 10(1)(j), (2)(c), Minn. (1983); H.B. 2693 § 7(1), Or. (1983).

[72]*Id.*

uation to determine whether or not she has any mental disability that would prohibit her from successfully abiding by the terms of the surrogate motherhood contract.[73]

Michigan House Bill No. 4555 mandates counseling of the natural father and his wife by a registered marriage counselor, a licensed psychologist, a psychiatrist, or a qualified employee of a licensed child placement agency. The counselor must sign a statement certifying that he has explained "the consequences and responsibilities of surrogate parenthood"[74] to the natural father and his wife and in the counselor's professional judgment the natural father and his wife understand these consequences and are prepared to undertake the responsibility.[75] With respect to the prospective surrogate, the Michigan proposal requires a qualified counselor (a licensed psychologist, physician, or qualified employee of a licensed child placement agency) to sign a statement attesting that the counselor has discussed the "potential psychological consequences of her consent"[76] to termination of parental rights and responsibilities and that the surrogate mother is capable of such consent.[77] Also, in the surrogate motherhood agreement, the surrogate must agree to submit to reasonable medical, psychiatric, or psychological exams or genetic screening requested by the natural father with the test results released to him.[78]

Under Maryland House Bill 1595 a natural father may reasonably request a surrogate to undergo pre-insemination psychiatric or psychological evaluation and may then require the surrogate to undergo psychological counseling prior to and after the birth of the child if recommended as a result of the psychiatric or psychological evaluation.[79]

Hawaii House Bill 1009 and Connecticut Committee Bill 5316 regulate the role of the inseminating physician.[80] The physician may not inseminate a surrogate mother unless he is satisfied that the natural father and the surrogate are mentally and physically suitable.[81]

In California Assembly Bill 3771 it is unclear whether the parties may choose to proceed with the surrogate motherhood arrangement if a physical, genetic, or psychological defect or problem is revealed by

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[73]Assembly Bill 3771 § 7506(b), Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 3(5), Conn. (1983); H.B. 1009 § 9(a)(5), Haw. (1983); S.B. 361 § 4(a)(2), Kan. (1983); S.B. 485 § 4(a)(3), Kan. (1984); H.F. 534 § 10(1)(e), Minn. (1983).

[74]H.B. 4555 § 4(1)(c), Mich. (1985).

[75]*Id.*

[76]*Id.* § 4(1)(f).

[77]*Id.*

[78]*Id.* § 7(1)(a).

[79]H.B. 1595 § 5-216(7)(I), Md. (1984); H.B. 1552 § 5-216(7)(I), Md. (1985) (This provision is analogous to Maryland H.B. 1595 § 5-216(7)(I), but the request may be made by the natural father or his spouse.).

[80]Comm. B. 5316 § 9, Conn. (1983); H.B. 1009 § 10, Haw. (1983).

[81]*Id.*

the required evaluation.[82] Five of the proposals, however, specifically leave the decision to proceed with the surrogate motherhood arrangement up to the parties themselves.[83] On the other hand, the Oregon proposal explicitly forbids insemination of a potential surrogate mother if the medical examinations reveal that a genetic defect or disease could be transmitted to the child,[84] and the Connecticut and Hawaii proposals forbid insemination of the surrogate unless the "physician is professionally satisfied with the mental and physical suitability of the surrogate and the natural father."[85]

As a precondition to judicial approval of a surrogate motherhood contract, several proposals require an investigation of the home of the natural father and his wife by a social welfare agency to determine the suitability of the home for a child.[86] The purpose of the investigation is to determine the capacity of the natural father and his wife to love, care and provide for the child born to the surrogate.[87] The probate judge reviews the agency's report, and if the report recommends that adoption of the child born to the surrogate be permitted, then the judge has ten days to certify the home of the natural father and his wife as suitable for the child. If the report recommends that adoption of the child born to the surrogate not be granted, then the judge must conduct a hearing to review the report and receive any additional evidence concerning suitability of the home. Based upon this hearing, the judge then certifies the home of the natural father and his wife as either suitable or unsuitable for adoption of the child born to the surrogate.[88]

C. The Contract

Most legislative proposals require the parties to a surrogate motherhood contract to be represented by independent legal counsel. The requirement removes the potential for conflicts of interest that the attorney could encounter by representing both sides to the contract.[89] These

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[82]Assembly Bill 3771 § 7506(b), Cal. (amended Aug. 2, 1982).

[83]S.B. 361 § 4(b), Kan. (1983); S.B. 485 § 4(b), Kan. (1984); H.B. 1552 § 5-216(6), (8), Md. (1985); H.B. 1595 § 5-216(6), (8), Md. (1984); H.B. 4555 § 5(1)(a), Mich. (1985).

[84]H.B. 2693 § 7, Or. (1983).

[85]Comm. B. 5316 § 9, Conn. (1983); H.B. 1009 § 10, Haw. (1983).

[86]Assembly Bill 3771 § 7505(c), Cal. (amended Aug. 2, 1982); H.F. 534 § 3, Minn. (1983); Comm. B. 5316 § 7, Conn. (1983); H.B. 1009 § 3, Haw. (1983); S.B. 485 § 6, Kan. (1984).

[87]H.F. 534 § 3, Minn. (1983); Comm. B., 5316 § 7, Conn. (1983); H.B. 1009 § 3, Haw. (1983); S.B. 485 § 6, Kan. (1984).

[88]H.F. 534 § 3(3), Minn. (1983); Comm. B. 5316 § 7(c), Conn. (1983); H.B. 1009 § 3(c), Haw. (1983).

[89]Assembly Bill 3771 § 7504, Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 5, Conn. (1983); H.B. 1009 § 8(b), Haw. (1983); H.B. 1552 § 5-215, Md. (1985); H.B. 1595 § 5-215, Md. (1984); H.B. 4555 § 10, Mich. (1985); H.F. 534 § 9(2), Minn. (1983).

proposals also require the contract to establish the expenses associated with the surrogate's pregnancy that will be paid by the natural father and his wife and to specify the fee that will be paid to the surrogate when she completes contract performance.[90] The surrogate agrees to terminate her parental rights in the child that she bears,[91] and the natural father[92] and his wife[93] agree to accept the child born to the surrogate, regardless of the child's condition.

Five legislative proposals require the contract to contain certain medical provisions.[94] Three of the proposals require the surrogate to agree to once a month prenatal exams for the first seven months of her pregnancy and twice a month prenatal exams for the last two months of her pregnancy.[95] The surrogate also agrees to follow any instructions from her physician.[96]

Three of the legislative proposals contain a potentially unconstitutional provision. Minnesota H.F. 534 requires the surrogate to contractually waive her constitutional right to an abortion unless it is necessary to save the surrogate's life.[97] Hawaii House Bill 1009 and Connecticut Committee Bill 5316 contain similar provisions, but the standard for permitting the abortion is lower because the abortion need only be necessary for the physical health of the surrogate.[98] Such a contractual provision restricting a woman's right to abort a pregnancy probably

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[90]Assembly Bill 3771 § 7506(c)-(f), Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 3(11)-(12), Conn. (1983); H.B. 1009 § 9(a)(12)-(13), Haw. (1983); H.B. 1552 § 5-216(11), Md. (1985); H.B. 1595 § 5-216(11), Md. (1984); H.B. 4555 § 7(3), Mich. (1985); H.F. 534 § 10(2)(a)-(b), Minn. (1983).

[91]Assembly Bill 3771 § 7506(a), Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 3(3), Conn. (1983); H.B. 1009 § 4(c), Haw. (1983); H.B. 1552 § 5-212, Md. (1985); H.B. 1595 § 5-212, Md. (1984); H.B. 4555 §§ 4(1)(d),6(1), Mich. (1985); H.F. 534 § 6, Minn. (1983); H.B. 2693 § 6, Or. (1983).

[92]Comm. B. 5316 § 3(16), Conn. (1983); H.B. 1009 § 9(a)(18), Haw. (1983); H.F. 534 § 10(3)(b), Minn. (1983).

[93]Assembly Bill 3771 § 7506(h), Cal. (amended Aug. 2, 1982); H.B. 1552 § 5-211(B), Md. (1985); H.B. 1595 § 5-211(A), Md. (1984); H.B. 4555 § 4(1), Mich. (1985); H.B. 2693 § 6(3), Or. (1983).

[94]Comm. B. 5316 § 3(7)-(8), Conn. (1983); H.B. 1009 § 9(a)(7)-(8), Haw. (1983); H.B. 1552 § 5-216(5)-(7), Md. (1985); H.B. 1595 § 5-216(5)-(7), Md. (1984); H.F. 534 § 10(1)(g)-(h), Minn. (1983).

[95]Comm. B. 5316 § 3(8), Conn. (1983); H.B. 1009 § 9(a)(8), Haw. (1983); H.F. 534 § 10(1)(h), Minn. (1983). *See also* H.B. 1552 § 5-216(7)(I)(3), Md. (1985), and H.B. 1595 § 5-216(7)(I)(3), Md. (1984) (requiring the surrogate mother to submit to prenatal medical care upon the natural father's reasonable request).

[96]Comm. B. 5316 § 3(7), Conn. (1983); H.B. 1009 § 9(a)(7), Haw. (1983); H.F. 534 § 10(1)(g), Minn. (1983); H.B. 1552 § 5-216(5), Md. (1985); H.B. 1595 § 5-216(5), Md. (1984).

[97]H.F. 534 § 10(1)(i), Minn. (1983).

[98]Comm. B. 5316 § 3(9), Conn. (1983); H.B. 1009 § 9(a)(9), Haw. (1983).

violates *Roe v. Wade*.[99] It has been argued that a woman's constitutional right to an abortion is inalienable and, therefore, cannot be restricted by contract.[100]

Four of the bills provide a mechanism for early termination of the contract. Connecticut Committee Bill 5316, Hawaii House Bill 1009, and Minnesota H.F. 534 allow the natural father and his wife to terminate the contract upon written notice to the surrogate if the surrogate has not become pregnant within a reasonable time.[101] Kansas Senate Bill 485 additionally permits the surrogate to terminate the contract if she has not become pregnant within a reasonable time.[102]

Finally, most of the proposed bills require the natural father, his wife, the surrogate, and her husband, if she is married, to sign the contract.[103]

D. Technical Requirements

Some of the proposals require court approval of the surrogate motherhood contract prior to artificial insemination of the surrogate.[104] The Michigan bill requires signed statements by the medical professionals involved to be filed in probate court.[105] Many of the bills also require the natural father and his wife to establish an escrow account for all expenses and fees to be paid to the surrogate.[106] Once all of the statutory requirements have been met, the court approves the surrogate motherhood arrangement.[107]

Some bills also require paternity testing following the birth of the child.[108] The natural father and the husband of the surrogate, if she is married, are required to undergo paternity testing to establish that the

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[99]Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936 (1986).

[100]*Id.*

[101]Comm. B. 5316 § 3(15), Conn. (1983); H.B. 1009 § 9(a)(17), Haw. (1983); H.F. 534 § 10(3)(a), Minn. (1983).

[102]S.B. 485 § 9(b)(5), Kan. (1984).

[103]Comm. B. 5316 §§ 5, 6(b)(3), 8(b)(3), Conn. (1983); H.B. 1009 § 8, Haw. (1983); S.B. 361 § 8(a), Kan. (1983); S.B. 485 § 9(a), Kan. (1984); H.B. 1552 § 5-216(1), Md. (1985); H.B. 1595 § 5-216(1), Md. (1984); H.F. 534 § 9, Minn. (1983); H.B. 2693 § 6, Or. (1983).

[104]Assembly Bill 3771 § 7505(c), Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 7, Conn. (1983); H.B. 1009 § 3, Haw. (1983); H.F. 534 § 3, Minn. (1983).

[105]H.B. 4555 §§ 4(1)(c), (e), (f), 9, Mich. (1985).

[106]Assembly Bill 3771 § 7506(f), Cal. (amended Aug. 2, 1982); H.B. 1009 § 9(a)(12), Haw. (1983); Comm. B. 5316 § 3(11), Conn. (1983); H.B. 1552 § 5-216(11), Md. (1985); H.B. 1595 § 5-216(11), Md. (1984); H.F. 534 § 10(2), Minn. (1983).

[107]Assembly Bill 3771 § 7505(c), Cal. (amended Aug. 2, 1982); Comm. B. 5316 § 7, Conn. (1983); H.B. 1009 § 3, Haw. (1983); H.F. 534 § 3, Minn. (1983).

[108]Comm. B. 5316 § 13, Conn. (1983); H.B. 1595 § 5-216(10), Md. (1984); H.B. 1552 § 5-216(10), Md. (1985).

natural father is a potential father of the child born to the surrogate.[109]

E. Responsibilities and Risks

Some of the proposed bills explicitly lay out the responsibilities of all parties to the surrogate motherhood contract and the risks that each party assumes in agreeing to the surrogate motherhood arrangement. For instance, Maryland House Bill 1552 makes it clear that during the period from conception to birth, parental rights and responsibilities for the child lie with the natural father and the surrogate; then starting at birth, parental rights and responsibilities for the child belong to the natural father and his wife.[110] Under Connecticut Committee Bill 5316, Minnesota H.F. 534, and Hawaii House Bill 1009, when the surrogate's sixth month of pregnancy is complete, the court issues an interim order giving child custody to the natural father and his wife.[111] The natural father and his wife have "exclusive authority to consent to all medical, surgical, psychological, educational and related services for the child."[112] This interim order becomes effective upon birth of the child.[113] The surrogate also agrees that she will not attempt to form a parent-child relationship with the child.[114] In addition, these three proposals state that the surrogate assumes the risk of potential complications and death from the pregnancy.[115]

Four bills also have rules that govern in the event that one or more parties to the contract dies. Connecticut Committee Bill 5316, Hawaii House Bill 1009, and Oregon House Bill 2693 establish that if one member of the contracting infertile couple dies before the child is born, then the other member assumes full responsibility for the child born to the surrogate.[116] The Connecticut and Hawaii bills establish that if both members of the infertile couple die before the child is born, then the surrogate has the option of either keeping the child or giving it up for adoption.[117] Michigan House Bill 4555 addresses the event of death to

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[109]*Id.* The Connecticut bill does not require the surrogate's husband to submit to paternity testing.

[110]H.B. 1552 § 5-211, Md. (1985).

[111]Comm. B. 5316 § 12, Conn. (1983); H.B. 1009 § 6, Haw. (1983); H.F. 534 § 7, Minn. (1983).

[112]*Id.*

[113]*Id.*

[114]Comm. B. 5316 § 3(2), Conn. (1983); H.B. 1009 § 9(a)(2), Haw. (1983); H.F. 534 § 10(1)(b), Minn. (1983).

[115]Comm. B. 5316 § 3(4), Conn. (1983); H.B. 1009 § 9(a)(4), Haw. (1983); H.F. 534 § 10(1)(d), Minn. (1983).

[116]Comm. B. 5316 § 3(17), Conn. (1983); H.B. 1009 § 9(a)(19), Haw. (1983); H.B. 2693 § 10, Or. (1983).

[117]Comm. B. 5316 § 3(17), Conn. (1983); H.B. 1009 § 9(a)(19), Haw. (1983).

both members of the infertile couple but requires the surrogate to assume full responsibility for the child in that event.[118]

F. Revocability; Remedies on Breach; Statutory Noncompliance

Although these legislative proposals allow and regulate surrogate motherhood, not all proposals require enforcement of the surrogate motherhood contract. Michigan House Bill 4555 permits the surrogate at any time to revoke her consent to the termination of parental rights,[119] and Kansas Senate Bill 485 allows the surrogate to declare the contract void.[120]

The opposite position is taken by California Assembly Bill 3771, which permits the infertile couple to require specific performance from the surrogate if the surrogate breaches the contract.[121] In three proposed bills, the court decides whether or not the surrogate may keep the child, but the burden of proof is upon the surrogate to show by clear and convincing evidence that it is in the best interests of the child to remain with her.[122]

Surrogate motherhood arrangements that comply with the proposed bills are excepted from all conflicting state statutes,[123] and some of the proposed bills impose penalties for statutory noncompliance. Violation of Michigan House Bill 4555 is a misdemeanor punishable by imprisonment of up to ninety days, a fine of up to $40,000, or both.[124] Violating Kansas Senate Bill 361 is a class C misdemeanor,[125] while Hawaii House Bill 1009 establishes a first violation of the proposal as a misdemeanor and the second violation as a class C felony.[126]

IV. Surrogate Motherhood Legislation: A Sensible Starting Point

A. Who May Participate

It has been argued that surrogate motherhood falls within the constitutionally protected right to privacy and procreative freedom.[127] If the

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[118]H.B. 4555 § 4(2)(3), Mich. (1985).

[119]*Id.* § 6(3).

[120]S.B. 485 §§ 2(b), 9(b)(4), Kan. (1984).

[121]Assembly Bill 3771 § 7551, Cal. (amended Aug. 2, 1982).

[122]Comm. B. 5316 § 14(d), Conn. (1983); H.B. 1009 § 7(c), Haw. (1983); H.F. 534 § 8(5), Minn. (1983).

[123]*See supra* note 60.

[124]H.B. 4555 § 3(2), Mich. (1985).

[125]S.B. 361 §§ 5(b), 6(b), Kan. (1983).

[126]H.B. 1009 § 8(c), Haw. (1983).

[127]*See* notes 6-20 *supra* and accompanying text.

practice is within this constitutionally protected area, then the state must show a "compelling state interest"[128] to regulate the practice. The United States Supreme Court has determined that states have a compelling state interest in protecting the best interests of children and in protecting the integrity of the family unit.[129] The tension between the right to privacy and the state's interests in children and family integrity makes legislative resolution of surrogate motherhood difficult. Also, because of the increasing demand and decreasing supply of adoptable children,[130] prohibiting surrogate motherhood would effectively deny many infertile couples the opportunity to have a family or would encourage those couples to seek a child through black market adoption.[131] Therefore, allowing the practice of surrogate motherhood serves the best interests of both the state and infertile couples who desire to use the practice. However, the precise impact of surrogate motherhood upon children born to the surrogate and upon family integrity is not yet known. Because unknown territory is being explored, a sensible, cautious first step approach to allowing the practice of surrogate motherhood would be to limit the practice to married couples with diagnosed infertility problems.

Surrogate motherhood could be restricted to married couples with diagnosed infertility problems and remain consistent with the Fourteenth Amendment to the Constitution. The reasoning adopted by the United States Supreme Court in *Katzenbach v. Morgan*[132] supports this approach. In that case, the Court upheld the constitutional validity of Section 4(e) of the Voting Rights Act of 1965, which provided that no person who had completed the sixth grade in a Puerto Rican public or accredited private school in which the classroom language was other than English could be denied the right to vote in federal, state, or local elections due to the inability to read or write English.[133] Section 4(e) precluded enforcement of the New York state election laws "requiring an ability to read and write English as a condition of voting."[134] One argument made by the plaintiffs, registered voters in New York City, was that because Section 4(e) applied only to Puerto Rican schools, it violated the Fourteenth Amendment by discriminating against non-"American-flag schools . . . in which the language of instruction was other than English."[135] The Court viewed Section 4(e) as a permissible limitation because rather than denying rights to a particular group (persons from

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[128]Roe v. Wade, 410 U.S. 113, 155 (1973).
[129]*See supra* note 30.
[130]Parker, *supra* note 2.
[131]Katz, *supra* note 36, at 7-8.
[132]384 U.S. 641 (1966).
[133]*Id.*
[134]*Id.* at 644.
[135]*Id.* at 656.

non-American flag schools), it *extended* rights to a group who were previously denied those rights by state law.[136] In speaking for the majority of the Court, Justice Brennan stated:[137]

> [I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did,"[138] . . . and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[139]

Therefore, state legislation legalizing surrogate motherhood need not, at least initially, extend to all individuals both married and unmarried, but may be restricted to married couples with diagnosed infertility problems. If this initial legislation proved successful in protecting the state's interests in children and family integrity, then the state could consider *extending* the right to unmarried individuals. Both California Assembly Bill 3771 and Michigan House Bill 4555 are consistent with this approach in that those bills restrict surrogate motherhood to married couples with infertility problems.[140]

Another cautious part of the legislation would be a requirement that both members of the infertile couple and the surrogate be at least twenty-one years of age to participate in a surrogate motherhood arrangement. No other proposed bill requires the natural father, his wife, and the surrogate mother to be twenty-one years of age to participate in a surrogate motherhood arrangement. The rationale for requiring the minimum age is maturity level. A person twenty-one years of age or older is likely to be more mature than an individual who is under twenty-one years of age. This added maturity helps insure that the parties to the surrogate motherhood contract will be better able to fully appreciate the risks and responsibilities that they are undertaking in the surrogate motherhood arrangement. Support for the age requirement may be found by analogizing to the state's prohibition of the use or consumption of alcoholic beverages by a minor.[141] The state has authority under its police powers to impose such a restriction,[142] and part of the rationale for the prohibition is to protect minors from the harmful effects of intoxicating

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[136]*Id.* at 657.

[137]*Id.*

[138]Roschen v. Ward, 279 U.S. 337, 339 (1928).

[139]Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1954).

[140]*See supra* note 65.

[141]*E.g.*, IND. CODE § 7.1-5-7-8 (Supp. 1986) provides:

"(a) It is a Class C misdemeanor for a person to recklessly sell, barter, exchange, provide, or furnish an alcoholic beverage to a minor."

[142]*See* Crane v. Campbell, 245 U.S. 304 (1917).

liquors.[143] Analogously, the state would want to protect minors from the harmful effects of entering into a surrogate motherhood arrangement that they were not mature enough to successfully complete. However, the rationale for providing an age requirement in the surrogate motherhood arrangement extends beyond the rationale for prohibiting the use or consumption of alcoholic beverages by minors. The state must also protect the interests of the child that will be born to the surrogate, and it would not be in a child's best interest to be born to parents who were too immature to fully appreciate the responsibilities of parenthood. Therefore, the age requirement would be another cautious restriction designed to protect the state's interests and to enhance the probability of a successful surrogate motherhood arrangement.

B. Physical and Psychological Examination; Investigation of the Home

A valid surrogate motherhood agreement should be based upon the informed consent of the parties to the contract.[144] Physicians, psychiatrists (or licensed psychologists) and lawyers should be involved in the process, but only to counsel. It should be up to the parties themselves to make the choices involved.[145] Five of the proposed bills use this approach by permitting the parties to decide for themselves whether or not to proceed with the surrogate motherhood arrangement after the required medical and psychological evaluations have been performed.[146]

To fulfill the informed consent standard, the prospective surrogate mother and the prospective natural father should undergo a physical examination and genetic screening administered by a licensed physician to determine the likelihood that a normal, healthy child free of genetic abnormalities will be born.[147] The physical examination and genetic screening results should be reviewed, evaluated and discussed in a conference with the physician, the prospective surrogate, and the infertile couple.

Likewise, the prospective surrogate and the infertile couple should undergo psychological counseling administered by a licensed psychiatrist or psychologist.[148] In the case of the prospective surrogate mother, the psychiatrist or psychologist should evaluate the surrogate's ability to complete the surrogate motherhood process and ultimately relinquish the

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[143]Elder v. Fisher, 247 Ind. 598, 603, 217 N.E.2d 847, 851 (1966).

[144]Parker, *Surrogate Motherhood, Psychiatric Screening and Informed Consent, Baby Selling, and Public Policy*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 21, 25-26 (1984).

[145]Parker, *Surrogate Motherhood: The Interaction of Litigation, Legislation and Psychiatry*, 5 INT'L J.L. & PSYCHIATRY 341 (1982).

[146]*See supra* note 83.

[147]*See supra* note 71.

[148]H.B. 4555 § 4(1)(c), (f), Mich. (1985).

child to the infertile couple, and counsel the surrogate mother about the physiological and emotional ramifications of being pregnant, and the potential emotional complications that may result upon relinquishing the child to the infertile couple.[149]

In the case of the infertile couple, the psychiatrist should evaluate the infertile couple's capacity to complete the surrogate motherhood process and to accept, love and raise a child born from the surrogate, particularly if the child is handicapped. The psychiatrist should also counsel the infertile couple concerning any potential emotional conflicts that may result from accepting and raising a child born from the surrogate.[150] The results of the psychological exams should be reviewed, evaluated and discussed in a conference with the psychiatrist or psychologist, the prospective surrogate, and the infertile couple.

Nearly all of the proposed bills require physical exams and genetic screening,[151] and many of the proposed bills also require some psychological evaluation[152] and counseling,[153] but those proposals do not go far enough to insure informed consent of the parties. Informed consent is based upon a goal of full disclosure of the information necessary to make a decision and a full understanding of that information.[154] A face to face meeting of the infertile couple, the prospective surrogate, and the medical professional can best accomplish that goal because questions and concerns that would be addressed in such a conference are material to all parties.

Several proposed bills also require an investigation of the home of the natural father and his wife by a social welfare agency.[155] The purpose of the investigation is to determine the capacity of the natural father and his wife to love, care and provide for the child born to the surrogate.[156] However, an investigation into the home of the infertile couple should not be required because the psychological counseling process is designed to identify the infertile couple's capacity to love and care for the child born to the surrogate. Also, an infertile couple that is financially able to go through with the surrogate motherhood process would almost certainly be able to provide for the child's physical (food, clothing, shelter) and educational needs.

Another important requirement expands an idea found in Maryland House Bills 1595 and 1552. Under those proposals a natural father may

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[149]H.B. 4555 § 4(1)(f), Mich. (1985).
[150]H.B. 4555 § 4(1)(c), Mich. (1985).
[151]*See supra* note 71.
[152]*See supra* note 73.
[153]H.B. 4555 § 4(1)(c), (f), Mich. (1985).
[154]*See supra* note 144, at 25-27.
[155]*See supra* note 86.
[156]*See supra* note 87.

request a surrogate to undergo psychological counseling prior to and after the birth of the child if recommended as a result of the initial psychological evaluation.[157] It would be important for the surrogate and the infertile couple to receive continued counseling throughout the surrogate's pregnancy because the surrogate or the infertile couple may have second thoughts about going through with the arrangement after committing themselves to it. Continued counseling is important to identify and resolve these second thoughts and any other psychological problems that the parties may encounter.

Psychological counseling should also continue for the surrogate for six weeks after the birth of the child. This period of counseling should be required for the surrogate to aid her in coping with the medical phenomenon known as postpartal depression, which can occur during a period of about six weeks after childbirth.[158]

C. The Contract

Following the initial requisite medical exams and counseling sessions, if the infertile couple and the prospective surrogate want to proceed with the surrogate motherhood process, then they should obtain independent legal counsel to negotiate a contract. Most of the legislative proposals contain this requirement so that each party's interests will be adequately protected.[159] The contract should specify all medical and legal expenses of the surrogate that will be paid by the infertile couple and the surrogate's fee for services in conceiving, carrying and giving birth to a child for the infertile couple.[160]

Most proposed bills also require the surrogate's husband, if she is married, to sign the contract.[161] However, the contract should go further with respect to the surrogate's husband. The contract should explicitly state that the surrogate's husband understands that his wife will be a surrogate mother, that he understands the terms of the contract and the legal rights, responsibilities and risks that flow to the surrogate, and that he consents to the surrogate motherhood arrangement. The surrogate's husband should further agree that he will abstain from sexual intercourse with his wife during the artificial inseminating process. These requirements are important to prevent any friction between the surrogate mother and her husband that would adversely affect the surrogate motherhood arrangement and to prevent the possibility that the surrogate's

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[157]H.B. 1595 § 5-216(7)(I)(2), Md. (1984); H.B. 1552 § 5-216(7)(I)(2), Md. (1985).

[158]E. FITZPATRICK, S. REEDER & L. MASTROIANNI, MATERNITY NURSING 305 (12th ed. 1971).

[159]*See supra* note 89.

[160]*See supra* note 90.

[161]*See supra* note 103.

husband would be the real biological father of the child born to the surrogate.

As required by most proposed surrogate motherhood bills, the contract should be signed by the parties.[162] The signed document operates as a continuing offer by the infertile couple that is accepted by the surrogate upon successful artificial insemination (insemination that results in conception) of the surrogate. Until successful artificial insemination of the surrogate, any party (including the surrogate's husband) may, upon written notice to the other parties, back out of the proposed arrangement. This escape hatch for the parties operates similarly to the provision for early termination of the contract found in four of the legislative proposals.[163] However, power to preclude acceptance of the offer before successful insemination of the surrogate should be extended to include the surrogate's husband so that conflicts between the surrogate and her husband that would adversely affect the surrogate motherhood arrangement may be avoided.

D. Technical Requirements

Some of the proposed bills require court approval of the surrogate motherhood arrangement.[164] Such a procedure is important in insuring that the parties have given informed consent to the surrogate motherhood contract.

The infertile couple, the prospective surrogate, the medical professionals, and the attorneys should submit affidavits to the probate court judge. These affidavits should demonstrate that the required examinations and counseling have been conducted and that the infertile couple and the prospective surrogate have given their informed consent to the surrogate motherhood contract. The contract should also be presented to the judge to insure that the required provisions are included in the contract and that all necessary parties (including the surrogate's husband) have signed the contract.

If the probate judge determines that the statutory guidelines have been met and the parties have given their informed consent to the contract, then the judge shall approve the contract. Once judicial approval has been given, the prospective surrogate may undergo artificial insemination, administered by a licensed physician.[165] Once successful insemination of the surrogate is achieved, the contract becomes enforceable.

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[162]*Id.*

[163]Comm. B. 5316 § 3(15), Conn. (1983); H.B. 1009 § 9(a)(17), Haw. (1983); S.B. 485 § 9(b)(5), Kan. (1984); H.F. 534 § 10(3)(a), Minn. (1983).

[164]*See supra* note 104.

[165]*Id.*

E. Responsibilities and Risks

Once the surrogate has conceived, the infertile couple should have all legal rights and responsibilities for the developing embryo and fetus; and when the child is born, the infertile couple should be the legal parents of the child.[166] Placing these rights and responsibilities with the infertile couple solves several problems. First, placing legal parenthood in the infertile couple avoids the problem of statutes like the Indiana statute governing consent to an adoption in which a mother cannot validly consent to an adoption until the child is born.[167] Because the infertile couple would be the legal parents of the child born to the surrogate, adoption would be unnecessary. Second, the problem of shifting responsibilities for the child found in other proposed bills would be avoided.[168] In Maryland House Bill 1552, parental rights and responsibilities for the child during the period from conception to birth lie with the surrogate mother and the natural father. When the child is born, these parental rights and responsibilities shift to the natural father and his wife.[169] Under Connecticut Committee Bill 5316, Hawaii H.B. 1009 and Minnesota H.F. 534, when the surrogate's sixth month of pregnancy is complete, the court issues an interim order giving custody to the natural father and his wife.[170] Rather than shifting parental rights and responsibilities, these rights and responsibilities should always lie with the infertile couple. The surrogate mother conceives, carries and bears a child *for the infertile couple*. Therefore, the infertile couple should always be the legal parents of the child and have all the legal rights and responsibilities normally accorded to parents.

Establishing the infertile couple as the legal parents of the child from the moment of conception does not, however, restrict the surrogate's constitutional right of privacy, which encompasses her decision to abort the pregnancy.[171] Three of the proposed bills have required the surrogate to contractually waive her right to abort the pregnancy.[172] However, the surrogate's constitutional right to abort a pregnancy probably cannot be waived by contract.[173]

Three of the proposed bills place the risk of complications and death that may result from the pregnancy upon the surrogate.[174] This risk

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[166]Bitner, *supra* note 35 at 254.

[167]*See supra* note 48.

[168]*See supra* notes 110-11.

[169]H.B. 1552 § 5-211, Md. (1985).

[170]*See supra* note 111.

[171]Roe v. Wade, 410 U.S. 113, 155 (1973). *See also supra* note 99 and accompanying text.

[172]*See supra* notes 97-98.

[173]*See supra* note 99.

[174]*See supra* note 115.

should be placed upon the surrogate because it would be unfair to make the infertile couple insurers of the pregnancy.

Finally, two of the proposed bills address the event of death of one or both members of the infertile couple.[175] These bills establish that if one member of the infertile couple dies before the child is born, then the other member assumes full responsibility for the child born to the surrogate. If both members of the infertile couple die before the child is born, the surrogate has the option of either keeping the child or giving the child up for adoption. However, if the infertile couple are legal parents of the child from the moment of conception of the child, then the death of one member of the infertile couple during the surrogate's pregnancy would still leave legal parenthood in the surviving member of the infertile couple. If both members of the infertile couple die, then the surrogate mother should have the option of either keeping the child or giving the child up for adoption because the surrogate is the biological mother of the child.

F. Revocability; Remedies on Breach; Statutory Noncompliance

The surrogate could breach the contract by aborting the pregnancy. As mentioned above,[176] the surrogate's right to an abortion most likely cannot be restricted by contract. In fairness to the infertile couple, if the surrogate aborts the pregnancy, then she should be required to reimburse the infertile couple for the expenses that the infertile couple have paid for the surrogate.

Michigan House Bill 4555 allows the surrogate to revoke her consent to the termination of parental rights,[177] and Kansas Senate Bill 485 allows the surrogate to declare the contract void.[178] Allowing the surrogate these options is unfair to the infertile couple. Unless the surrogate is within her constitutional right to abort the pregnancy, the infertile couple should be permitted to require specific performance of the contract when the child is born. The purpose of the surrogate motherhood statute should be to permit infertile couples to have children by means of a surrogate mother. This purpose is seriously undercut if the surrogate mother is permitted to keep the child. The surrogate mother's purpose is to conceive, carry and bear a child *for the infertile couple*. The infertile couple should be the legal parents of the child born to the surrogate *ab initio*. The infertile couple have the same responsibilities of any parents and if they do not want the child, then they would still have a duty to find

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[175]Comm. B. 5316 § 3(17), Conn. (1983); H.B. 1009 § 9(a)(19), Haw. (1983).

[176]*See supra* note 99.

[177]H.B. 4555 § 6(3), Mich. (1985).

[178]S.B. 485 §§ 2(b), 9(b)(4), Kan. (1984).

a good home for the child. The duty is no different for any parent.[179]

Also, if paternity testing reveals that the husband of the infertile couple is not a potential father of the child, then there would be no contract at all. The contracting document operates as a continuing offer which is accepted only by successful artificial insemination of the surrogate. If the husband of the infertile couple is not a potential father of the child, then there has been no successful artificial insemination of the surrogate and, therefore, no acceptance of the offer.

Finally, surrogate motherhood contracts that do not comply with this statute should be forbidden as constituting child selling, a criminal offense.[180] Making noncompliance with the statute a criminal offense provides strong incentive for all parties to the contract to comply with the statute, and because one of the greatest concerns of the state is child selling, it is logical to regard an illegal surrogate motherhood contract as child selling.

V. Conclusion

The practice of surrogate motherhood provides a technological solution to the infertility problems of many infertile couples. The state should not prohibit the practice just because it is uncharted legal ground. However, the state should proceed cautiously in mapping out the legal boundaries of this area in which there are still so many unresolved questions. The proposed legislation is a sensible, cautious first step in providing a logical and workable legal solution to the practice of surrogate motherhood, a solution that aids infertile couples in establishing a family and furthers the state's interest in protecting family integrity and the welfare of children.

D. Michael Young

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[179]Ramsey v. Ramsey, 121 Ind. 215, 216, 23 N.E. 69, 70 (1889).

[180]*See* Ind. Code § 35-46-1-4, *supra* note 38.

ARTICLES

NOTES

DEDICATIONS